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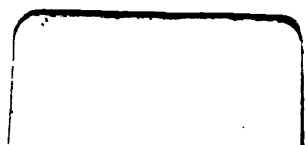
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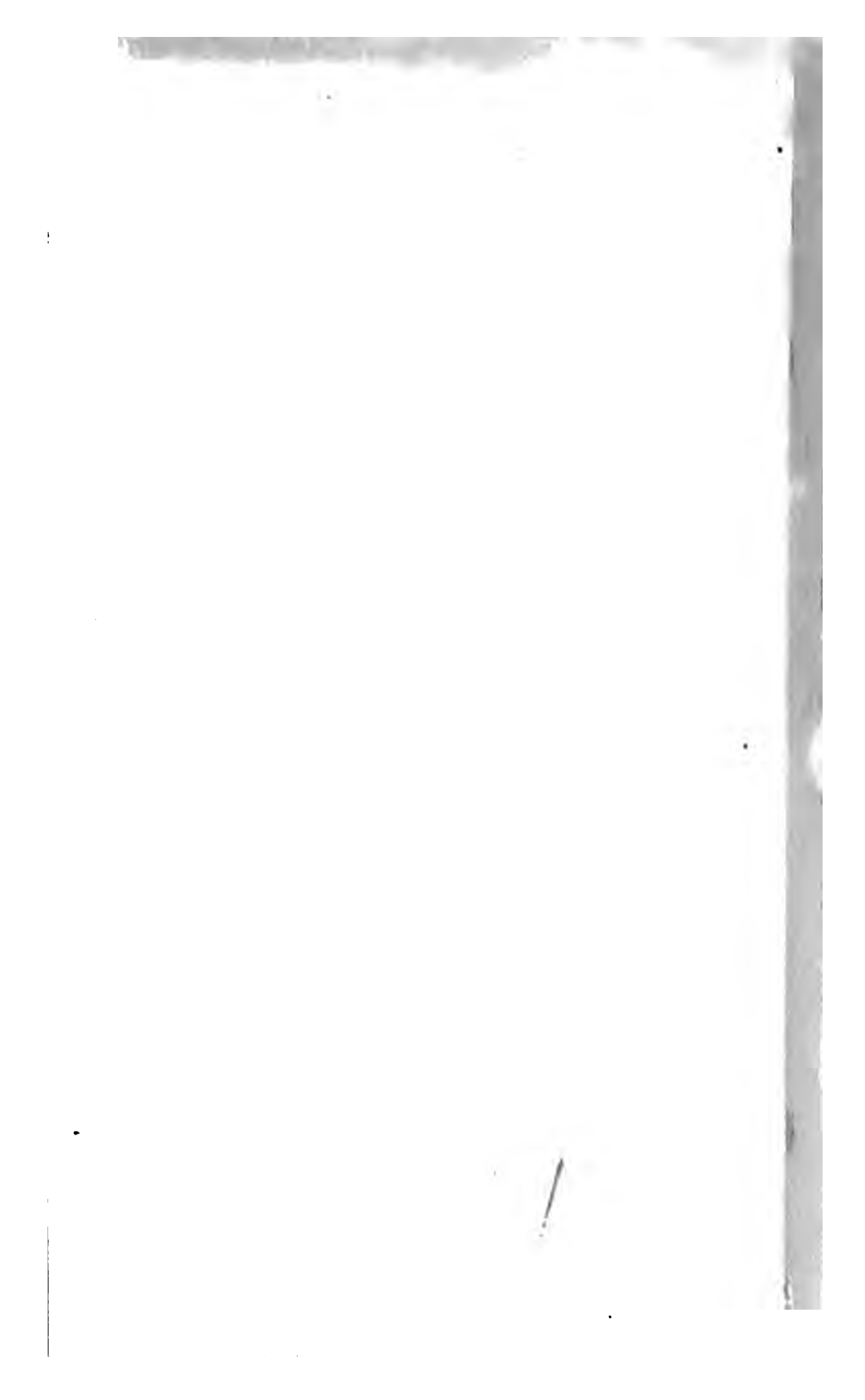
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CASES
ARGUED AND DETERMINED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES,
FOR THE
SEVENTH JUDICIAL CIRCUIT.

BY
JOSIAH H. BISSELL,
OF THE CHICAGO BAR,
OFFICIAL REPORTER.

VOL. IV.—1860—1869.

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PREFACE.

Since the commencement of the publication of this Series of Reports, a large number of opinions by the different Judges within the circuit have come to the reporter's hands after the publication of the volumes to which they respectively belonged. These opinions are of such interest and value that the series would be essentially incomplete were they not to appear, even though their publication necessarily involves a break in the continuity of the series.

The reporter has, therefore, after a careful examination of these opinions, selected such as he deemed most valuable, and now presents them in their chronological order, with such notes and references to subsequent decisions as will, he trusts, make them more practically useful to the profession, and present, even in the older cases, the present state of the law applicable to the questions involved.

The opinions of the late Hon. David McDonald of Indiana, were furnished by his executors, and revised by him for publication shortly before his decease. Those of the other Judges have, in every case, been revised by the respective Judges. For the notes, the reporter alone is responsible.

J. H. B.

Chicago, March 1, 1875.

JUDGES

SITTING IN THE SEVENTH CIRCUIT DURING THE PERIOD
COVERED BY THIS VOLUME.

HON. DAVID DAVIS,

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED
STATES.

Allotted to the Seventh Circuit. Appointed December 8, 1862.

HON. THOMAS DRUMMOND,

CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT.

District Judge since February 19, 1850. Appointed Circuit
Judge December 22, 1869.

HON. ANDREW G. MILLER,

DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN.

Appointed June 12, 1848, Resigned November 11, 1873.
Deceased September 30, 1874.

HON. SAMUEL H. TREAT,

DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Appointed March 3, 1855.

HON. DAVID McDONALD,

DISTRICT JUDGE FOR THE DISTRICT OF INDIANA.

Appointed December 13, 1864. Deceased August 25, 1869.

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CASES
ARGUED AND DETERMINED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES.

SEVENTH JUDICIAL CIRCUIT.

THE R. G. WINSLOW.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—DECEMBER
TERM, 1860.

IN ADMIRALTY.

1. **DELIVERY FROM WAREHOUSE—WHEN COMPLETE.**—In delivering wheat from a warehouse through a pipe into a vessel, the duty of the warehouseman is complete, and his liability ended, with the discharge of the wheat into the pipe.

2. **MASTER'S DUTY IN LOADING.**—The duties of the master extend to all that relates to the loading of the cargo, and the vessel is liable for his faithful performance. It is his business to arrange the pipe and trim the vessel.

3. For any wheat lost by the careening of the vessel and consequent parting of the pipe, the vessel is liable.

This was a libel filed by Daniel Newhall against the bark R.

The R. G. Winslow.

G. Winslow for the loss of seven hundred bushels of wheat while being discharged from a warehouse into the vessel. The loading commenced about twelve o'clock on the morning of the third of October, 1859, the wheat being weighed by the shipper, in the cupola of the warehouse, in one hundred bushel drafts, which were tallied by the first mate, there present. It was then passed from the warehouse to the vessel through a pipe of heavy boiler wrought iron. The pipe was about sixteen feet long, and ten inches in diameter. The warehouseman fastened one end of the pipe to the warehouse, and placed the other on the deck of the vessel, to be regulated, watched and shifted by the second mate. After the delivery of about five thousand bushels of the wheat the vessel careened, and the pipe parted. In consequence of this accident, about seven hundred bushels of wheat went, partly on the deck of the vessel, and partly on the dock, and were lost in the river. Both the master and the second mate were asleep below at the time of the accident.

Emmons & Van Dyke, for libellant.

Finches, Lynde & Miller, for respondent.

MILLER, J.—If the mate who had charge of the pipe had been vigilant in watching the discharge of wheat from the pipe, but a small quantity of one draft would have been lost, for by a word from him to the persons in the cupola, the flow of wheat could have been instantly shut off; and it was his duty to give the order.

I do not think it material to inquire how much the vessel careened, or whether the pipe broke or parted at the joint, or whether the careening of the vessel caused the parting of the pipe, or whether the parting of the pipe was at a place over the deck of the vessel or over the dock. The mate on board, who had charge of the pipe, and of the discharge of the wheat from the pipe into the hold of the vessel, neglected his duty, and al-

The R. G. Winslow.

lowed seven drafts of one hundred bushels of wheat to be lost. In respect to the loading and carriage of the goods, the master is chargeable with the most exact diligence. His responsibility with respect to them begins where that of the wharfinger ends, and when they are delivered to some accredited person on board the ship. If he receives them at the quay, or beach, or sends his boat for them, his responsibility attaches from the moment of the receipt. Not only is the master responsible with respect to the safety and security of the goods, but the vessel is also liable. It stands as the shipper's security, and is, by the maritime law, hypothecated to him for his indemnity. The duties of the master as carrier extend to all that relates to the loading, transportation, and delivery of the goods. And for the faithful performance of those duties the ship stands pledged, as well as the master and the owners personally.¹ And the manner of taking goods on board, and the commencement of the master's duty in this respect, depends on the custom of the particular place. More or less is to be done by the wharfingers or lightermen, according to the usage.² The master of the vessel knew that the wheat was to be delivered on board through the pipe; and he also knew the manner of weighing and discharging the grain from the hopper, when he made the contract; and with such knowledge he had the first mate placed in the cupola, to tally the drafts, and the second mate stationed on deck to watch the discharge of the wheat from the pipe into the hold of the vessel, and to keep the vessel trimmed; and the work had commenced before he turned in. It is not the business of the officer in charge of the receiving of wheat from a warehouse through a pipe, to permit any person not belonging to the vessel, nor under his command, on board, to shift the pipe, or to trim the vessel. This is as much the business of the vessel, as weighing the wheat is of the warehouseman. The parties proceeded to put the wheat on board,

¹ Flanders on Shipping, §189.

² Abbott on Shipping, 845.

The R. G. Winslow.

according to the usual manner of loading vessels with grain from warehouses.

The pipe is attached to the warehouse, and it is used jointly by the warehouse and the vessel. The vessel controls the discharge of the wheat from the warehouse through the pipe. The order to discharge or to stop, is given from the vessel ; and the wheat is weighed by the warehouseman, and the drafts are tallied by the first mate before discharged from the hopper. Using the pipe in loading the vessel was necessary, in the performance of the contract made by the master with the shipper, for which the owners were to receive compensation in the freight earned by the vessel. Unless the wheat was transported, freight would not be earned ; and it could not be transported unless a pipe was used in its delivery on board. The master might have supplied a pipe ; and with the consent of the owner of the warehouse, he might have attached it to the warehouse and used it. But there can be no difference in law, whether he used the pipe of the warehouse or his own pipe. He had the sole control of the warehouse pipe, and made it the pipe of the vessel *pro hac vice*.¹ I am satisfied that the duty of the warehouseman ended with the tally of the drafts by the mate, and the discharge of the wheat from the warehouse into the outside pipe, and that the duty of the master then commenced. At that moment the delivery of the wheat was complete, and the liability of the vessel attached. The shipper had then fully parted with the possession ; and having no longer any control, or right of control, over the wheat, he was in no degree responsible for its actual delivery on board. Upon the same principle it was ruled, in the case of the *Bark Edwin*, 23 Law Reporter, 198, that the vessel was liable for the non-delivery of bales of cotton according to contract, which were lost before reaching the vessel, in consequence of the explosion of the boiler of a lighter, in which the cotton was be-

¹ De Mott vs Laraway, 14, Wendell, 225.

The R. G. Winslow.

ing carried from the cotton press to the vessel, in the possession of the master of the vessel.

This case is different from a contract merely executory, where there has been no delivery of the goods to the master, nor change of possession, nor effort to deliver. When there is no delivery of the goods, the contract of the master for their transportation creates no lien. *Buckingham vs. The Schooner Freeman*, 18 Howard, 182. There the bill of lading of goods not shipped was designed as an instrument of fraud. And in *Vandewater vs. Mills*, 19 Howard, 82, where there was a contract for the future employment of the vessel. And in *Hannah vs. The Schooner Carrington*, 2 Law Monthly, 456; where the ship was withdrawn from the trade, and refused further to comply with a contract of affreightment. And in *The Joseph Grant*,¹ it was decided that the master has no authority as such to sign a bill of lading in blank, and that the libellant as assignee of the bill of lading, filled up after the vessel sailed, acquired no lien on the vessel. The cargo on board at the time corresponded with the bill of lading as filled up, but it was delivered to a different consignee, according to the bill of lading correctly given by the master before the vessel sailed.

The cases here referred to are wanting in the essential particular of delivery to the vessel, to make them precedents governing the case under consideration. The wheat lost by the negligence of the mate, was delivered to the vessel as a portion of the twenty thousand bushels contracted to be received on board and transported to Buffalo; and the libellant should have a decree for its value.

The delivery of cotton on a lighter, employed by the owner of the vessel, is a delivery to the vessel, and the responsibility of the owners as common carriers attaches. *Bulkley vs. Naumkeag Steam Cotton Co.*, 1 Clifford, 322.

Delivery to a carrier should be according to the usage of his business, and actual or constructive; and the delivery is complete if the master, mate,

¹ Vol. 1 of this Series, 193.

Goodrich vs. City of Chicago.

or other agent of the owner, receive them either at the ship, or on the wharf, or in a warehouse, according to the usage. 2 Parsons on Contracts, 175, 6, 7. *Ball vs. New Jersey Steamboat Co.*, 1 Daly, 491. Angell on Carriers, §§181-184.—[Reporter.]

ALBERT E. GOODRICH vs. CITY OF CHICAGO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY TERM, 1864.

IN ADMIRALTY.

1. In the construction of the charter of a city the federal courts are bound by the decision of the Supreme Court of the State.

2. **LIABILITY OF CITY FOR OBSTRUCTIONS IN RIVER.**—If a city undertakes to remove obstructions from a river, which it is under no legal obligation to remove, and abandons the work without having changed the *status* of the obstruction, it does not become liable for subsequent damages caused by such obstruction. The city by assuming such a work does not assume any new liability.

This was a libel filed by Albert E. Goodrich to recover damages sustained by reason of an obstruction in the Chicago river. The libellant alleges that he is the owner of a line of propellers regularly navigating the lakes, and that one of them, leaving the port of Chicago, ran against a sunken rock in the river and was seriously injured. The ground-work of the proceeding was that the city of Chicago, by its charter, had been vested with exclusive jurisdiction and control over the river, and that the duty was imposed on it to remove obstructions, and that this duty was binding on it.

It is provided in the city charter of Chicago that the city may remove and prevent all obstructions in the waters which are public highways in said city, and widen, straighten,

Goodrich vs. City of Chicago.

and deepen the same; may preserve the harbor, prevent any use of the same, or any act in relation thereto, inconsistent with or detrimental to the public health, or calculated to render the waters of the same, or any part thereof, impure or offensive, or tending in any degree to fill up or obstruct the same; prevent and punish the casting or depositing therein any earth, ashes, or other substance, filth, logs, or floating matter; *prevent and remove all obstructions therein*, and punish the authors thereof; and shall have power to regulate and prescribe the mode and speed of entering and leaving the harbor, and of coming to and departing from the wharves and streets of the city, by steamboats, canal-boats, and other craft and vessels, and the disposition of the sails, yards, anchors, and appurtenances thereof, while entering, leaving, or abiding in the harbor; and to regulate and prescribe, by such ordinances, or through their harbor-master or other authorized officer, such a location of every canal-boat, steamboat, or other craft or vessel, or float, and such changes of station in and use of the harbor as may be necessary to promote order therein, and the safety and equal convenience, as near as may be, of all such boats, vessels, crafts, and floats; and may impose penalties not exceeding one hundred dollars for any offense against any such ordinance; and by such ordinance charge such penalties, together with such expenses as may be incurred by the city in enforcing this section, upon the steamboat, canal-boat, or other vessel, craft, or float. The harbor of the city shall include the piers and so much of Lake Michigan as lies within the distance of one mile into the lake, and the Chicago river and its branches to their respective sources.—*Laws and Ordinances of Chicago*, 1873, pp. 403, 407.

Further facts are stated in the opinion.

Goodwin, Larned & Goodwin, for libellant.

Robert Rae & B. F. Ayer, for the City.

DAVIS, J.—The question depends upon the proper construc-

Goodrich *vs.* City of Chicago.

tion to be given to the provision in the charter of the city of Chicago. The defendant contends that the language is that of permission and not of command, while libellant insists that it must be considered as creating an imperative duty. If this question was an open one I should have no hesitation in holding that the legal obligation does so rest, and that the city is bound to make full redress to a party who is injured by neglect of that duty. I think that the true interests of commerce and the best interests of the city would be promoted by such a construction, and that it is sanctioned by principle and authority.

But the Supreme Court of the United States has always held that the federal judiciary will adopt the adjudications of the judicial department of the several states as the appropriate organ for construing the legislative enactments of that government.¹

Goodrich sued at law in one the courts of the state for the same matter for which this libel is brought. The declaration sets forth the cause of action fully; it asserted the legal obligation of the city and its liabilities because the city had wrongfully let the obstruction remain to the danger of navigation. All the provisions of the charter, which could be supposed to confer authority on the city, were cited, and it was averred that the city had assumed the liability, and for that purpose had levied taxes, had controlled the waters, and had passed ordinances relating to them. In one of the counts of the declaration the ordinance of the common council was set forth. In short, every averment was made that was necessary to raise the question. A demurrer was interposed to this declaration which was sustained, and the case was taken to the Supreme Court for adjudication. The case is reported in 20 Illinois, 445, and the judgment of the court below was affirmed. The Supreme Court say, "To maintain this action we must hold, that the city is bound to exercise all the author-

¹ *Elmendorf vs. Taylor*, 10 Wheaton, 152.

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ity here conferred and to do all the acts here authorized. Such, we are satisfied, was not the intention of the legislature."

This is an authoritative adjudication denying the exclusive obligation and duty on the part of the city. In order to escape the effect of this decision, the libellant avers that the city undertook to remove the rock, and left it in a more dangerous position than at first. This averment was doubtless made because the Supreme Court said if the authorities of the city undertook to remove this rock, and in so doing had carelessly left it in an exposed position, by reason whereof the plaintiff's steamer had run against it, and was injured, the city would be liable. There can be no clearer principle of law than this: that a municipal corporation, when it undertakes to do an act must do it carefully, and if not an action will lie. I think the proof, however, fails to establish the fact that what was done by the city tended to the injury of the harbor. The harbor-master did attempt to get the rock out, but abandoned the enterprise. He swears the rock was so imbedded in sand that he did not succeed in loosening it. The master of the tug corroborates the testimony of the harbor-master, and swears that the sunken stone or rock did not change position at all. But it is said the city assumed to remove it. In what way? By passing an ordinance requiring the harbor-master to give notice to masters of vessels to remove. It may be said that this ordinance imposed no legal obligation as is averred in the libel. But it is said also that the city assumed the responsibility when the harbor-master tried and failed. I cannot see how that fact of itself could impose a legal obligation. The attempt was made to remove the obstruction and abandoned. It injured no one. The act was not wrongful and was not the cause of the accident. It was proper enough to try to remove the obstruction, but it was not imposed on the city as an imperative duty, and on no legal principle can the libel be maintained. The city has done nothing in this case to injure the harbor, and if the Supreme Court decision is binding on me there is an end to this litigation.

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I have not discussed the question of *res adjudicata*. The judgment, although on demurrer, is a judgment on the merits, and it decides that the action will not lie.

The libel is dismissed.

Affirmed in the Supreme Court on the ground of *res adjudicata*. 5 Wallace, 566.—[Reporter.

EDGAR CONKLING vs. JOHN M. BUTLER, *et al*.

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY TERM, 1865.

RECEIVER—JURISDICTION.

1. A receiver cannot be called on to account before any court but that which appointed him.

2. Where a state court, on a petition under the Indiana statutes to dissolve a corporation, has taken jurisdiction, thereby decreed a dissolution of the corporation, appointed a receiver, and taken the custody of the assets, no national court can take jurisdiction of a bill to call on the receiver to render an account, and to collect the assets under the direction of the United States Court.

William Henderson, for complainant.

R. C. Gregory, for defendants.

MCDONALD, J.—This is a bill in chancery, filed by Edgar Conkling against John M. Butler and the New Castle and Danville Railroad Company. The defendants have demurred to the bill; and the point to be decided is, whether the demurrer ought to be sustained.

The bill alleges that the complainant subscribed and paid into the capital stock of said Railroad Company fifty thousand dollars, and received certificates of stock to that amount; that the total stock subscribed was about one million five hundred and eighty-two thousand three hundred dollars and eighty-three cents; that about a million of this is "unavailable and

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valueless ;" that about forty-five per cent. of the stock has been collected, and the residue subscribed has not been paid ; that the legal liabilities of the company are about eighteen thousand dollars ; that the unpaid solvent subscriptions of stock are about two hundred and twenty-five thousand dollars ; that the construction of the road has been abandoned, and the corporation put in liquidation ; that, on the first of December, 1862, the defendant, "John M. Butler, was appointed receiver of said New Castle and Danville Railroad Company, who duly qualified as such, and took upon himself the duty imposed by said appointment as such receiver, and who is now in the full possession of all the books, papers, vouchers, moneys, bonds, records, and other evidences of indebtedness of said New Castle and Danville Railroad Company ; that the said Butler, as such receiver, though specially requested by the complainant so to do, is making no effort to collect any more of the uncollected stock subscribed to the said road than will pay the said \$18,000 indebtedness, after which he contemplates a final settlement of said trusts, as appears by Exhibit A filed as a part of this bill."

The foregoing is the substance of the bill. It prays for an account, for the equalization of the losses among the subscribers to the stock, &c.

The bill is clearly defective as failing to show by what authority Butler was appointed a receiver, unless that is shown by Exhibit A already named. Whether the language of the bill, as above copied, amounts to an averment that Butler was appointed receiver by the Hamilton Circuit Court (Indiana), as appears by Exhibit A, may well be doubted. Indeed, I think it does not. Rather, I suppose that the true construction of the reference to exhibit A, is, that after Butler has paid off said \$18,000, he means to collect no more of the subscriptions to the capital stock, but intends then finally to close his labors as a receiver. But as the bill could easily be so amended as to make this point clear, it is of little importance. The exhibit is made part of the bill, and must be looked to in determining the demurrer.

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Let us then examine Exhibit A. It purports to be a transcript of a proceeding commenced on March 1st, 1859, in the Hamilton Circuit Court of this state, and, so far as anything appears, still pending in that court. It was an information by the State of Indiana on the relation of David Nation, prosecuting attorney, against the New Castle and Danville Railroad Company, charging a forfeiture of the charter of that company, and seeking a judgment of ouster. A judgment of forfeiture and ouster was rendered, and thereupon the Hamilton Circuit Court appointed one O. S. Hamilton as receiver in that case. Hamilton acted as such receiver till September 8, 1862, when he resigned his place, and the defendant, Butler, was appointed by the court as receiver in the place of Hamilton, and, so far as appears, still continues so.

These proceedings were evidently had under the 44th article of the Indiana code of Practice and Pleading.¹ That code plainly contemplates that the receiver to be appointed, in case of a judicial dissolution of a corporation, shall act under the direction of the court appointing him, and shall, in all his doings, be controlled by such court, and account to it. If that cause is still pending in the Hamilton Circuit Court, and if Butler has not yet made final settlement therein of the trust of that court reposed in him, he might at any time be compelled by that court to render account of his doings to the same; and if he failed to do it, he would be liable on the bond which, it seems, that court exacted to secure the faithful performance of his duties as receiver.

By the bill demurred to, it is proposed to call Butler away from the court which appointed him,—which exacted his official bond, to which he must, by the terms of his bond and of the Indiana Code, account, and whose directions he is bound to obey,—and require him to account to, and obey, another court, which never had anything to do with his appointment or with the case under which he was made a receiver. The mere state-

¹ 2 G. & H., 323 to 325.

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ment of the case thus made by the bill is enough to show the impossibility of sustaining it. Butler is sued here as a receiver, and called upon to here account as a receiver. He never, in any case, was a receiver of this court, and cannot be called on to answer as such in it.

The same may be said of the other defendant,—the railroad company. This company was called before the Hamilton Circuit Court to answer to a charge of forfeiture of its franchises. That court declared them forfeited, took away all its property, and put it into the hands of a receiver. That property is now, in legal contemplation, in the custody of the Hamilton Circuit Court. Can it be possible that Mr. Conkling has a legal right to call on this court to drag this defunct corporation before us, and to urge here that we should interfere with property now in the custody of a state court of competent authority to do full justice in the whole matter? If the present complainant has rights, he ought, instead of applying here, to apply in the Hamilton Circuit Court, cause himself to be made a party to the proceeding pending there, and look for justice against the receiver to the court that made him a receiver, and controls him as a receiver.

The bill is bad for another reason. It asks a contribution to the complainant from various other stockholders of the company. Yet these stockholders are not made parties to the bill.

There are various other fatal objections to the bill. Indeed, of the six causes set out in the demurrer, every one is fatal to the bill. But as the one first above considered goes to the question of the jurisdiction of this court, it is unnecessary to consider the others minutely.

The demurrer is sustained, and the bill is dismissed at the complainant's costs.

Consult also *Astor vs. Heron*, Mylne & Keene, 396; *Chalio vs. Pickering*, 1 Keene, 749.

The same principle is held in reference to executors, that they cannot be proceeded against outside of the jurisdiction by which they were appointed. *Security Insurance Company vs. Taylor*, Vol. 3 of this Series, 446.—[Reporter.

THE UNITED STATES vs. ONE DISTILLERY.

DISTRICT COURT.—DISTRICT OF INDIANA.—MAY TERM, 1865.

1. PARTICULARITY IN INFORMATION.—An information under the Internal Revenue Law claiming a forfeiture of a distillery, and things connected with it, for a violation of that law, must describe with reasonable certainty the things on which a judgment of forfeiture is asked. It is not sufficient to describe them as "all the boilers, stills, and other vessels used in the distillation of spirits, and all the distilled spirits—being about twelve barrels—now in the distillery owned by Samuel W. Walts."

2. NEED NOT NEGATIVE A PROVISIO.—A pleading on a statute is not required to negative an exception in a proviso to it.

3. An information of this kind must aver that the property sought to be adjudged forfeited, was used in the illicit distillation charged, or (being spirit) was the product of such distillation.

John Hanna, U. S. District Attorney, for the United States.

MCDONALD, J.—This is a proceeding *in rem*, for the forfeiture of "all the boilers, stills, and other vessels used in the distillation of spirits," and twelve barrels of distilled spirits, the property of Samuel W. Walts. The forfeiture is claimed on the ground that Walts has failed to comply with certain provisions of the Internal Revenue Law concerning distillers of spirits.

The information contains four counts, attempting to charge four distinct violations of the revenue law. Walts appears and files two separate demurrers—one to the whole information, and one to each of its counts severally.

Without inquiring whether a demurrer is the proper method of testing the validity of an information in the nature of a libel *in rem*, we will proceed to inquire whether the objections urged against this information are valid.

1. Under the general demurrer to the whole information, it

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is objected that the property proposed to be forfeited is not sufficiently described. It is described thus: "All the boilers, stills, and other vessels used in the distillation of spirits, and all the distilled spirits—being about twelve barrels—now in the distillery, owned by and (until seized) in the possession of Samuel W. Walts, and situated in the township of Greenville, county of Floyd, and state of Indiana."

The rules of pleading in this kind of cases are very lax as to matters of form. As to matters of substance, however, the better opinion is that "every fact and circumstance material in law to the maintenance of the suit must be set forth with precision, clearness, and reasonable certainty."¹ There is no good reason why an information of this kind should not be as clear and certain as a declaration in an action at common law. At common law, the declaration must describe goods and chattels, when they are subjects of the suit, with reasonable particularity and certainty; and it must generally state their quantity and number.² A declaration in trover or replevin, for divers horses or cattle, without stating their number, would doubtless be bad. In the present case the information does not state how many boilers, stills, or other vessels are claimed to have been forfeited. It, indeed, describes the spirits which it claims have been forfeited as being "*about* twelve barrels." But this is too loose a description either of the quantity or number. For these reasons I think that the whole information is defective.

2. It is objected that the information does not, by proper averments, take the case out of the operation of the statute of limitations. The act on which this prosecution is founded, after declaring the offense and forfeiture, adds this proviso: "Provided, that such seizure be made within thirty days after

¹ Conkling's Treatise, 516; Schooner Hoppet *vs.* The United States, 7 Cranch, 389; Brig Caroline *vs.* The United States, Id., 496; Schooner Anne *vs.* The United States, Id., 570.

² Stephen on Pleading, 296.

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the cause for the same shall have come to the knowledge of the collector or deputy collector; and that proceedings to enforce said forfeiture shall have [been] commenced by such collector within twenty days after the seizure thereof.”¹ The rule is, that if the exception is contained in the enacting clause, the pleading must negative it; but that if it is superadded, by way of proviso, the party who would avail himself of it, must do so by a pleading setting up the proviso.² Therefore, if Walts would avail himself of this proviso, he must do it by pleading, not by demurring.

3. The first count of the information charges that, from the first of May till the fifteenth of July, 1864, said Walts was “engaged in distilling spirits” without having procured from the proper collector any license authorizing him to do so, and without having made any application to the proper assessor for such license. There are several fatal objections to this count. It is bad for not stating that the distilling charged was done in the use of the property sought to be adjudged forfeited. The count, indeed, avers that Walts “was engaged in distilling spirits”; but it fails to inform us whether in doing so he used the implements sought to be forfeited, and whether the twelve barrels of spirits claimed to have been forfeited were the product of the illicit distillation charged. All the other counts of the information are equally defective for the same reasons. And a particular examination of them would, therefore, serve no good purpose.

The demurrers are sustained.

That, in pleading, it is not necessary to negative a *proviso* in the statute, consult *The Mary Merritt*, Vol. 2 of this Series, 381. Opinion by DRUMMOND, J. *Commonwealth vs. Fitchburg Railroad Co.*, 10 Allen (Mass.) 189; *Matthews vs. State*, 24 Arkansas, 484; *Kline vs. State*, 44 Mississippi, 317. As to particularity, consult *United States vs. Scott*, following case, and *United States vs. Prescott*, Vol. 2 of this Series, 325.—[Reporter.]

¹ 13 U. S. Statutes at Large, 248.

² 1 Chitty on Pleading, 223; *Teel vs. Fonda*, 4 Johnson, 804; *Smith vs. Moore*, 6 Greenleaf, 278.

THE UNITED STATES vs. GEORGE T. SCOTT.

DISTRICT COURT.—DISTRICT OF INDIANA.—MAY TERM, 1865.

INDICTMENT—MISJOINDER OF COUNTS—DEFECTIVE COUNTS.

1. Counts for conspiracy can not be joined with counts for murder.
2. In what cases an indictment will be sufficient, which charges the crime in the terms of the statute creating it.
3. Requisites of a good indictment for murder under an act of Congress punishing opposition to the enrollment of the national forces.
4. In the national courts there can be no indictment unless some act of Congress authorizes it.

John Hanna, U. S. District Attorney, for the United States.

McDonald & Roach, for defendant.

MCDONALD, J.—The indictment in this case contains three counts.

The first count, in general terms, charges that the prisoner conspired with divers persons named, to prevent the execution of three distinct acts of Congress, the titles of which it recites.

The second count charges a like conspiracy with the same persons with a like purpose, and alleges that, in pursuance of that purpose, the prisoner and his co-conspirators assaulted one Eli McCarty while “in the performance of his legal service” in relation to the due execution of said acts of Congress, and murdered him.

The third count charges that the prisoner, intending to prevent the execution of said acts of Congress, assaulted said “McCarty being then and there a person employed in the performance of service relating to the enrollment of the national forces duly ordered by the proper legally constituted authorities,” and that while he was thus employed, the prisoner murdered him.

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Counsel for the prisoner now move to quash the whole indictment for a misjoinder of counts. They also move to quash each count as being defective on its face.

I. As to the question of a misjoinder of counts.

In examining this question, it is not important to consider whether each count in itself is either good or bad. In civil actions there may be duplicity, though a part be ill pleaded.¹ So, though some of the counts be defective in an indictment, there may be a misjoinder. This rule, however, would not prevail, where the part supposed to produce the duplicity or misjoinder is mere surplusage. But that is not the case here.

The first count in this indictment charges a mere conspiracy, which is only a misdemeanor, or at most a felony not punishable capitally. The second and third charge murder, a capital crime.

At common law, the general rule is, that if the legal judgment on each count would be materially different, as in the case of a misdemeanor and a felony, there can be no joinder.² Here the judgment on the first count could only be fine and imprisonment.³ On the second and third counts, the punishment, on conviction would be death.⁴ Judged, therefore, by the rules of the common law, there is plainly a misjoinder of counts in this indictment.

The District Attorney, however, insists that an act of Congress on this subject cures this defect. The act referred to provides that "whenever there are or shall be several charges against a person or persons for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined," the whole may be joined in one indictment.⁵ The latter provision of this act

¹ Gould on Pleading, 427.

² Wharton's American Criminal Law, §418.

³ 12 U. S. Statutes at Large, 284.

⁴ 18 U. S. Statutes at Large, 8.

⁵ 10 U. S. Statutes at Large, 162.

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evidently does not alter the common law.¹ And, in our opinion, the former part of the statute cited does not help the case. For we can not see from any allegation in the indictment before us, either that all these counts refer to "the same act or transaction," or that they all are "acts or transactions connected together." Indeed, the contrary appears by the indictment itself; for the first and second counts charge a conspiracy between the prisoner and divers other persons; the third charges a murder committed by him alone.

The indictment is plainly bad as having a misjoinder of counts.

But, as this defect may be cured by a *nolle prosequi* to some of the counts, we will examine the motion to quash the separate counts.

II. The motion to quash each count as being defective on its face.

1. The first count charges, in general terms, a conspiracy between the prisoner and several other designated persons "to prevent, hinder, and delay, by force, the execution" of three acts of Congress relating to the military, and particularly designated in the indictment.

The count is on the act of July 31, 1861, which declares that if two or more persons shall conspire together, by force, to prevent, hinder, or delay the execution of any law of the United States, they shall be deemed guilty of a high crime, &c.² The count is in the words of the act, which, as a general rule, is sufficient; and we think it sufficient in the present case. We hold the first count good.

2. The second count is, in our opinion, clearly bad. It substantially charges a combination between the prisoner and others to prevent, hinder, and delay the execution of certain

¹Weinzorpfli *vs.* The State, 7 Blackford Reports, 186; The State *vs.* Smith, 8 do., 489.

²12 U. S. Statutes at Large, 284.

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acts of Congress, and that, in attempting to consummate this unlawful purpose, the prisoner murdered Eli McCarty.

In the national courts there can be no indictment unless some act of Congress authorizes it. There is no act of Congress punishing murder committed under the circumstances stated in this count. Such a killing is exclusively cognizable in the state courts.

3. The third count charges that the prisoner did assault, hinder, and impede one Eli McCarty while in the performance of his legal service, under and in pursuance of, and in relation to the due execution of, a law of the United States, &c., he the said Eli McCarty being then and there a person employed in the performance of service relating to the enrollment of the national forces, duly ordered by the proper and legally constituted authorities, in pursuance and by virtue of the laws aforesaid, and murdered said McCarty in that assault. The indictment states these facts with more formality than we have done; but the above is the substance of them.

The act of Congress under which this indictment is framed, provides that whoever shall "assault, obstruct, hinder, impede, or threaten any officer or other person employed in the performance of any service in any way relating" to the enrollment of the militia, shall be deemed guilty of murder, if, in such opposition to the officer or other person, death shall ensue.¹

We think the allegations in this count are not sufficiently particular and definite. In indictments for murder, the utmost certainty has always been required. Here it is not stated whether McCarty was an officer or not, or under what or whose authority he was acting. Nor is it stated what particular duties connected with the enrollment of the national forces he was performing at the time of the assault and murder. The indictment indeed alleges that McCarty was "a person employed in the performance of service relating to the enrollment."

¹ 18 U. S. Statutes at Large, 8.

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But it omits to state whether he was an officer or a mere servant of an officer. It says that he was "duly ordered by the proper legally constituted authorities" to perform these duties. But it fails to state who were those authorities. It avers that certain things were "legally" and "duly" done. But this is merely pleading matter of law. How they were legally and duly done ought to have been averred. All these are very vague allegations in an indictment for murder.

Where a man was indicted for stealing coin, the indictment was held bad for not stating the species of coin stolen.¹

Where an indictment charged that the accused "retarded" an officer in the discharge of his duty, it was held bad for not showing the *acts* by which the officer was retarded.²

It is true that the third count follows the words of the act on which it is founded. This, we have already said, as a general rule, is sufficient; and we have applied this rule to the first count. But it is a rule seldom applicable to indictments for capital crimes; and it is subject to many exceptions even in lower offenses. It is, indeed, often difficult to determine when such a mode of pleading may be safely adopted. The Supreme Court of Indiana say, "as an approximation to a test," that where a statute defines the offense generally, and designates the particular acts constituting it, it is sufficient, in charging the crime, to follow substantially the language of the statute; but where the statute defines the crime generally without naming the particular acts which constitute it, it might be necessary to set out the acts done, so that it might appear to the court whether the acts done amount to the crime.³ We are of opinion that this is a distinction worthy to be followed; and we think it applies even in cases not capital, and is strongly applicable to the case at bar.

We are clear that the third count is bad.

¹ *Rex vs. Fry, Russell & Ryan's Crown Cases*, 482.

² *Rex vs. How*, 1 *Strange*, 699.

³ *Malone vs. The State*, 14 *Indiana*, 219.

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Upon this ruling, the District Attorney entered a *nolle prosequi* to the second and third counts. The prisoner thereupon pleaded guilty to the first count, and was sentenced to the penitentiary for six years.

NOTE BY JUDGE McDONALD.—The prisoner, George T. Scott, and his co-conspirators were afterwards indicted for the murder of Eli McCarty under the 12th section of the act of February 24, 1864. 13 U. S. Statutes at Large, 8. One of them pleaded guilty, and died in jail before judgment was pronounced on him. The others, on plea of not guilty, were tried by a jury and found guilty. On a motion in arrest of judgment on this verdict, and on a certificate of difference of opinion between Judges Davis and McDonald, the case was transferred to the Supreme Court of the United States. That court held that there was no act of Congress reaching the case, and therefore ordered the judgment to be arrested. And it was arrested accordingly. See 3 Wallace, 642.

All the conspirators, however, stood indicted for conspiracy under the act of July 31, 1861. 12 U. S. Statutes at Large, 284. To these indictments they pleaded guilty, and were sentenced to the penitentiary for six years.

An indictment must be certain to a certain intent in general. *United States vs. Forrest*, 3 Cranch, C. C. R., 56; *United States vs. Watkins*, *Ib.*, 441.

It is in general sufficient to describe a statutory offense in the words of the statute. *United States vs. Lancaster*, 2 McLean, 431; and it is sufficient if it be substantially set out, though not in the precise words of the statute. *United States vs. Bachelder*, 2 Gallison, 14; *United States vs. Pond*, 2 Curtis, 205; *United States vs. Wilson*, Baldwin, 79; *United States vs. La Cote*, 2 Mason, 129; *State vs. Cook*, 38 Vermont, 437; *Harrison vs. The State*, 2 Coldwell, 232; *Commonwealth vs. Turner*, 8 Bush, 1.

The federal courts have no common law jurisdiction in criminal cases. *United States vs. Wilson*, 3 Blatchford, 435; *United States vs. Worrall*, 2 Dallas, 384, 393; *United States vs. Hare*, 2 Wheeler's Criminal Cases, 283 800; *United States vs. Hudson*, 7 Cranch, 82.

Nothing can be punished under the United States laws which is not made criminal by statute. *United States vs. Lancaster*, 2 McLean, 431; *United States vs. Libby*, 1 Woodbury & Minot, 221; *United States vs. New Bedford Bridge*, *Ib.*, 401.—[Reporter.]

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JAMES PULLAN vs. THE CINCINNATI AND CHICAGO AIR-LINE RAILROAD COMPANY *et al.*

CIRCUIT COURT.—DISTRICT OF INDIANA.—JUNE TERM, 1865.

IN EQUITY.

1. CORPORATE POWERS.—A corporation has only such powers as its charter gives, either expressly, or as incident to its existence.

2. POWER TO MORTGAGE FRANCHISES.—No corporation can mortgage its franchises without clear legislative authority to do so. And authority to a railroad company to mortgage its "road, income, and other property," does not authorize a mortgage of its franchises.

3. Legislative authority to mortgage, includes the power to make a deed of trust in the nature of a mortgage.

4. A trust deed may be void in part, and valid in part.

5. ROLLING STOCK—WHEN INCLUDED IN MORTGAGE.—A mortgage by a railroad company of "all the present and future-to-be-acquired property of the company, including the right of way and land occupied, and all rails, and other materials used therein or procured therefor," includes the rolling stock of the road.

6. PARTICULAR DESCRIPTION CONTROLS GENERAL TERMS.—Where a mortgage, in describing property, employs at first general terms, and afterwards proceeds to describe particularly each thing mortgaged, the latter will control the former, if there be a repugnancy.

7. SPECIFICATION—WHEN EXCLUSIVE.—In a deed, specification generally excludes things not specified. But the omission to specify a thing, without which the things specified would be of no value, does not exclude it.

8. A railroad company having a general power to mortgage its road, may mortgage any part of it.

9. PARTIES.—Purchasers *pendente lite* are not necessary parties to a bill in chancery. The judgment binds them, though they are not brought before the court.

10. INJUNCTION—WHEN GRANTED.—A temporary injunction will be decreed, where without it great injury may happen to the complainant, and no injury can result from it to the defendant.

11. APPOINTMENT OF RECEIVER—DISCRETIONARY.—The appointment of a receiver is generally within the sound discretion of the court. But it is a power only to be exercised in strong cases. In no case of a mortgage ought

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a receiver to be appointed if it is clear that on a foreclosure the mortgaged property will bring enough money to pay the debt, interest, and cost.

John W. Grubbs, T. D. Lincoln, and J. P. Siddell, for complainant.

E. Walker, and McDonald & Roach, for defendants.

MCDONALD, J.—This is a bill filed by James Pullan against the Cincinnati and Chicago Air-line Railroad Company, and others. Pullan sues as a trustee for divers bondholders under a deed of trust in the nature of a mortgage.

The matter now before the court is a motion for a temporary injunction, and for the appointment of a receiver.

The facts and pleadings on which this motion is founded are substantially as follows:

On the 16th of February, 1848, the Legislature of Indiana enacted a charter authorizing a company to make a railroad from Richmond to New Castle, Indiana. The style of the corporation was the New Castle and Richmond Railroad Company, and the length of the road twenty-seven miles.

In January, 1851, the charter was amended so as to enable the company to extend their road either to the Indianapolis and Peru Railroad, or to the Lafayette and Indianapolis Railroad. This amendment also authorized the company to borrow money on mortgage of their "road, income, and other property."

To effect a loan of money for the completion of the road, the company issued coupon bonds to the amount of three hundred thousand dollars, dated February 25, 1852, payable February 25, 1867, with interest at seven per cent., payable semi-annually. The bonds were one thousand dollars each. To secure their payment a trust deed was executed by the company. By this trust deed, the company conveyed "all the present and in-future-to-be-acquired property of the said The New Castle and Richmond Railroad Company; that is to say: the first section of their road from Richmond to New

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Castle as aforesaid, with the superstructure and all rails and other materials used therein, and all rights therein, tolls and income, and any rights thereto or interest therein, together with the tolls or income to be had or levied therefrom, and all franchises, rights, and privileges of the said The New Castle and Richmond Railroad Company of, in, to, or concerning the same." Such is the verbose language of the deed. It was made to Joseph B. Varnum and George Carlisle, and to the survivor of them, and to the heirs of such survivor, in trust that if the company should fail duly to pay either interest or principal on said bonds, the trustees might enter on and take possession of the mortgaged property, and use the same, and apply the proceeds of such use to the payment of the principal and interest of the bonds; and that, if it should become necessary, the trustees might sell the mortgaged property at auction and apply the proceeds to the payment of such principal and interest.

Carlisle, one of the trustees, died in March, 1863. And Varnum, the other trustee, becoming old and unwilling to perform the trust, the Wayne Circuit Court, in 1864, appointed the complainant, James Pullan, a trustee in the place of Carlisle.

The name of the company was, in April, 1853, changed to that of "The Cincinnati, Logansport and Chicago Railway Company." And, in 1858, it was again changed to that of "The Cincinnati and Chicago Railroad Company."

In April, 1853, the corporation executed to said Carlisle another mortgage in the nature of a deed of trust to secure the payment of other bonds. This mortgage was foreclosed in this court in 1860. It covered all the property of the company, which, under the decree of foreclosure, was sold by the proper officer to Choteau, Murdock, Schucharde, Thompson, and Morgan for thirty thousand dollars. These purchasers, in July, 1860, under an act of March 5, 1859, of the Indiana Legislature, being the owners of said property, became a

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corporation under the style of The Cincinnati and Chicago Air-line Railroad Company.

This foreclosure and sale in no manner effected the rights of the bondholders under the deed of trust first aforesaid.

It appears that ever since said new organization, the defendant Judson has been President, and the defendant Tenny, Secretary, and the defendant Morgan, Treasurer, of the Cincinnati and Chicago Air-line Railroad Company.

It seem that, on the 16th of October, 1856, the last-named company attempted to lease to one John W. Wright and Company, for a term of ten years, all their property.

It appears also that the last-named railroad company has since attempted to consolidate with other railroad companies, both within and without the state of Indiana. But whether these doings were valid or not, seems immaterial to the present case. Even since the commencement of this suit, there has been an attempt at consolidation, including the Cincinnati and Chicago Air-line Railroad Company, and several others, under the name of The Chicago and Great Eastern Railway Company.

It is conceded that the deed of trust and bonds first aforesaid form the first lien on so much of the road in question as lies between New Castle and Richmond; and that on these bonds no interest has been paid for about two years past.

Under the circumstances, the Trustee, James Pullan, has filed his bill in equity to enforce the mortgage of February 25, 1852.

The bill, besides charging most of the facts above stated, alleges, *inter alia*, that the Cincinnati and Chicago Air-line Railroad Company, by their said purchase under judicial sale, took the road with the burden of said first mortgage bonds, and were bound to provide for the payment of the interest on them, but have neglected and refused to pay it; that for some time past, the earnings of the road have been large, and far above the current expense of running it; that the surplus earnings ought to have been, but were not, applied to the

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payment of said interest; that the same had been wrongfully applied in building a bridge across the Wabash at Logansport, beyond the terminus of the Cincinnati and Chicago Air-line Railroad, as it was located by the New Castle and Richmond Railroad Company, at the time when the first mortgage bonds were executed, and in building and completing another railroad, and furnishing it with rolling stock, and in buying up some of said first mortgage bonds on speculation and at reduced prices, and in discharging individual liabilities of the defendants, Judson, Tenny and Ripley; that the officers of the road have been permitted by the company to use corrupt and oppressive measures to force the holders of the bonds in question to exchange them at a sacrifice for other securities of the company; that the company are paying interest on certain sinking fund bonds issued by them at a later date than those represented by the complainant; that Judson and Tenny, officers of the company, threaten that unless the holders of the bonds of February 25, 1852, accede to certain terms proposed by the company, they will build a road parallel to so much of their road as lies between New Castle and Richmond and turn the business thereon so as to depreciate said security for said three hundred thousand dollars of bonds; that the officers of the company have, by false representations of the security for said bonds, greatly reduced their value in the market; that the company are making no provision for the payment of said interest; and that its officers refuse to permit either said trustees or the bondholders to examine the books of the company with a view to ascertain the amount and appropriation of its earnings.

The bill prays an injunction against the building of said parallel road, and for a receiver, and for general relief.

The bill is sworn to.

The Cincinnati and Chicago Air-line Railroad Company have filed an answer supported by affidavit. This answer denies the power of the New Castle and Richmond Railroad Company to execute the trust deed and bonds in question;

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but it states facts in support of that denial. It denies any obligation on the part of the respondent to pay the interest on said bonds; but it admits that the company has all along received and appropriated the earnings of the road. It denies that said earnings have been misapplied, or applied towards the construction of said bridge across the Wabash, or for any purpose charged in the bill. It denies that the president and other officers of the company, "as such officers," have by threats endeavored to force the bondholders to surrender the bonds on any terms, or that, "as such officers," they have decried the value of the bonds, as charged in the bill.

The answer attempts to excuse the failure to pay the interest in question by stating that the company had offered to the holders of the bonds on which the interest had accrued, other bonds issued by them to the full amount of those on which said interest had accrued, if the holders would throw off the interest, and alleging that all the earnings had been expended in improving and repairing the road and providing the necessary rolling stock, &c., to run it.

The answer also states that under the laws of Indiana and Illinois, the railroad leading from Richmond to Logansport and the "Chicago and Great Eastern Railway" were consolidated, and that these now form one continuous line of two hundred and twenty-four miles from Richmond to Chicago.

Whether it is claimed that these two form now one body corporate, is not clearly stated. If such a consolidation is meant to be claimed, I do not see how the thing could be effected under the rulings of the Supreme Court in the case of the *Ohio and Mississippi Railroad Company vs. Wheeler*, 1 Black, 286. I suppose that a consolidation for running arrangements between roads in different states may be lawful. But I suppose that two railroad corporations of different states can not be consolidated into one new corporation.

The complainant now moves for the appointment of a receiver and for an injunction. Affidavits and other documents have been filed, both in support of this motion and in

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opposition to it; and very able and exhaustive arguments have been made on both sides of the question.

Several preliminary points arise on this motion, which it may be well first to notice.

1. It is contended that the New Castle and Richmond Railroad Company had no power to make the trust deed in question.

I recognize the rule that a corporation "possesses only those properties which the charter of its creation confers upon it, either expressly, or as incident to its very existence."¹

Under the Indiana Constitution, every statute is a public law of which the courts must take official notice, unless it is otherwise declared in the statute itself. Article IV, §27. I must therefore, *ex-officio*, take notice of the charter powers of the New Castle and Richmond Railroad Company, though its charter is neither pleaded nor proved. So it is decided in the case of *The Covington Draw-bridge Company vs. Shepherd*, 20 Howard, 227, though a contrary doctrine is held in *Charleston &c. Turnpike Co., vs. Willey*, 16 Indiana, 35.

The original charter provided that the company might "negotiate any loan or loans of money at any rate of interest deemed expedient," and that "the principal and interest of all debts so contracted shall be a lien, in their order, on all property and effects of the company." And the amendment to the charter provided that, for constructing and equipping the road, the company might borrow money, issue its bonds or notes therefor, and, to secure the same, mortgage its "road, income, and other property." Undoubtedly here is a power to make a deed of trust in the nature of a mortgage.

But it is said that the deed of trust in this case undertakes to mortgage the company's franchises; and that the charter gives no power to do that. It is true that the deed does at-

¹ Head *vs.* The Providence Insurance Company, 2 Cranch, 127; *Beaty vs. Knowler*, 4 Peters, 152; *Trustees of Dartmouth College vs. Woodward*, 4 Wheaton, 518, 636; *Jefferson Branch Bank vs. Skelly*, 1 Black, 436.

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tempt to mortgage, among other things, "all franchises, rights and privileges" of the company. And it seems to be well established that no corporation can, without express legislative authority, either sell or mortgage its franchises. The charter, indeed, empowers the company to mortgage its "road, income and other property;" and this language is equivalent to authority to mortgage *all* the company's property. Franchises are, in some sense, property; and it may thus be plausibly argued, that power to mortgage all *property* is, therefore, power to mortgage all franchises. I think, however, that the argument is not sound; and that this deed of trust, so far as it attempts to mortgage franchises, is void.

But it does not follow that the deed is void as to the mortgage of the road itself, and its tolls, income, and real estate. In my opinion the mortgage is valid as to these. And whatever may be said of the franchises is quite unimportant to the present motion, since, if it be even allowed to any extent, it certainly would be rash, and improper, and useless to turn over the franchises to a receiver.

2. It is contended that, at most, this deed of trust only embraces so much of the road as lies between New Castle and Richmond, and the tolls and income arising therefrom, and that it does not embrace any rolling stock.

By the language of the deed, it seems to me obvious that only such portion of the road as lies between those two points, with the "bridges, depots," and other things thereon, and the tolls and income arising therefrom, are mortgaged. I can not conceive that any part of the road or its fixtures, situate between New Castle and Logansport, is touched by the mortgage. I think that without a deed of trust, the original charter would have made this three hundred thousand dollars a lien on the whole road and on all its fixtures and other property. But the creditors having elected to take the security which this deed of trust gives, must, perhaps, be deemed to have waived the lien given by the original charter,—

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especially so, as the bill in this case makes said deed the foundation of the present action.

Whether by this instrument any rolling stock at all is mortgaged, is a more difficult question. The tolls and income are expressly mortgaged. Without rolling stock, there could be neither tolls nor income. Now it is a maxim that whosoever grants a thing is supposed also tacitly to grant that without which the grant itself would be of no effect. *Cui-cunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit.*¹

In my opinion the spirit of this maxim ought to be applied to the point in question. The description of the mortgaged property is at first in general terms, thus: "All the present and in-future-to-be-acquired property" of the company. Then it proceeds to specify,—“That is to say: the first section of their road from Richmond to New Castle, including the right of way and land occupied thereby from Richmond to New Castle as aforesaid, with the superstructure, and all rails and other materials used therein or procured therefor, bridges, viaducts, culverts, fences, depot grounds and buildings erected thereon, and all rights therein, tolls and income,—any rights thereto and interest therein,—together with the tolls or income to be had or levied therefrom.” I agree with defendant's counsel that the first general statement in this description is controlled and limited by the subsequent specific description in which rolling stock is not even mentioned; and that *expressio unius est exclusio alterius*. But I think that the omission to specify a thing along with other things which are enumerated, does not exclude it, if any of the enumerated things could be of no use without it. And that seems to me to be the case here. None of the things specified could be of much value to the mortgagees without the rolling stock. On a foreclosure, the lands, superstructures and fixtures might,

¹ 11 Co. R., 53; Broom's Legal Maxims, 464.

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indeed, be sold; but the tolls and income could not be. Besides, the deed of trust provides another remedy to the mortgagees in case of a default by the mortgagors,—the very remedy which the complainant is now seeking through a receiver. It provides that in case of a default, the trustees may enter and take possession of the mortgaged property, and use and operate the same, and apply the proceeds thereof to the payment of the interest and principal of the bonds intended to be secured by the mortgage. Now, in pursuing this remedy, of what avail would all the other property be if the rolling stock cannot be used? Nay, could the remedy be pursued at all without the use of the rolling stock? The reason of the rule that when a man grants a tract of land in the center of a larger tract owned by him, he also grants, by implication, a right of way into it, fully applies to the case in question; and it strongly applies to the mortgage of tolls and income. It is truly said by Mr. Justice Twisden, that “when the use of a thing is granted, every thing is granted by which the grantee may have and enjoy such use.” *Pomfret vs. Ricraft*, 1 Saunders, 321. And Mr. Justice Story approves and adopts this language in the case of *The Charles River Bridge vs. The Warren Bridge*, 11 Peters, 629. So in *Whitney vs. Olney*, 3 Mason, 280, an analogous principle is sustained. It was there held that the devise of a mill, *eo nomine*, carried with it the mill-yard so far as the same was necessary to the use of the mill. A like doctrine is maintained in *Blaine’s Lessee vs. Chambers*, 1 Sergeant & Rawle, 169, and in *The Common Council vs. The State*, 5 Indiana, 334.

If it be said that the present is the case of a mortgage, and not of a grant or devise like the cases just cited, it may well be answered that the reason is the same in them all, and therefore the rule ought to be the same.

I am of opinion that, at least so far as concerns the present motion for a receiver, the rolling stock ought to be regarded as being reached by the mortgage. If this case ever comes to

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a decree of foreclosure, it will then perhaps be the proper time to determine whether this is so far a mortgage of any rolling stock as to justify the court in ordering its sale. And, as a final determination of the point is unimportant to the pending motion, as I view it, the question is left open for argument on the final hearing.

3. It is argued that this deed of trust is void, because the company had no power to mortgage its road in parcels as was here attempted. I think the power to mortgage the whole road, manifestly given in the charter, necessarily gives the power to mortgage any part of it. This power, I think, would exist without express legislation, as the power to contract is incident to the very existence of such a corporation. Besides, the second mortgage and the judgment of foreclosure on it expressly recognize the validity of this deed of trust. The defendants hold the road under a sale to them on this judgment; and they are therefore estopped to deny the validity of this deed of trust.¹

4. It is objected that, as the Chicago and Great Eastern Railroad Company has, since the commencement of this suit, by consolidating with the Cincinnati and Chicago Air-line Company, become interested in the subject of this litigation, the former company ought to be made a party to it. Volunteers who become interested *pendente lite* are not necessary parties. Without being brought into court, the judgment binds them.²

Let us now proceed to inquire whether, upon the case made, an injunction and a receiver ought to be ordered.

I. As to a temporary injunction.

We have seen that, according to the bill, the defendants have threatened that unless the bondholders submit to certain oppressive terms, that portion of the road lying between Richmond and New Castle "shall be practically cut off"

¹ Bronson *vs.* La Crosse Railroad Co., 2 Wallace, 288.

² Story's Equity Pleadings, §§156, 351.

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from the residue of the line, "by the construction of a road from New Castle to Connersville, Indiana, by which the whole business upon the road above New Castle shall and will be diverted from the part of the road from New Castle to Richmond." And the bill charges that the defendants "are secretly aiding and encouraging the building of such road for such purpose.

The answer denies that the officers of the company, "as such officers of said company," have made the threats charged; and it especially denies "that any threats have been made by the defendant, or by any one authorized to speak in behalf of this defendant [the company]; that if the said parties represented by the complainant would not take the bonds issued under the mortgage issued by this defendant in exchange for the bonds so held by said parties, that this defendant would construct a road from New Castle to Connersville, Indiana, and practically cut off that part of the road upon which the complainant claims that the said mortgage rests;" but the answer, nevertheless, claims in substance that the company may lawfully do so if they please. Whether the company intends to do so, is not stated in the answer. These denials in the answer are very carefully guarded. They look so much like a negative pregnant that they naturally raise in my mind some suspicion; and taking this circumstance together with the affidavits filed on both sides, I think it fair to conclude that the threat has been made in substance, and that the complainant has just ground to fear that it may be carried out. I shall therefore order the temporary injunction. And I do this with the less hesitation, since, if the company and its officers have no such design, the order can do them no harm, and since, in my opinion, the defendants are grossly mistaken in affirming in their answer that they have a right to do what the threat imports, if they please. To me it appears that any attempt to divert business from the road between New Castle and Richmond would, under the circumstances of this case, be most unjust and inequitable.

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II. Let us next inquire how the case stands on the motion for a receiver.

The power of courts of chancery to appoint receivers is a discretionary power, to be exercised with great caution.¹

To dispossess the owner of property of its possession before a final hearing, is a strong measure, not to be adopted but in a strong case. I think it should never be done unless, without it, the complainant would be in danger of suffering irreparable loss.

Is the present such a case?

The bill charges that no interest on the bonds in question has been paid for about ten years past; and the answer admits this allegation. This of itself is a very strong circumstance in favor of the motion. These are first mortgage bonds, and have precedence of all other liens on the company's property; and it is startling to find so long a delay to pay interest. At first blush it would raise the suspicion that the owners of the road had been very unfortunate, or very reckless, or very unmindful of their duty. The fact that the property mortgaged has changed hands once or twice since the bonds were executed does not tend to remove that suspicion. The new owners took the property *cum onere*, and ought, if they could, to pay the interest. In the case of *Williamson vs. The New Albany and Salem R. R. Co.*,² in October, 1857, before Judge McLean, it appeared, on a motion like the present, that the defendant had failed to pay the semi-annual interest which fell due in April, 1857. And principally, if not solely, for that single and recent failure, the chancellor, while in from he overruled the motion for a receiver, did what was nearly equivalent to appointing one: he placed the road so far under the control of the court, as to require that company to make monthly reports to the court of the net income of

¹ Railroad Co. *vs.* Soutter, 2 Wallace, 510.

² Vol. 1 of this Series, 198,

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the road and to pay a certain proportion thereof into court every month for the use of the bondholders.

Another important fact established in the case at bar, is that the trustee, Varnum, as also some of the bondholders, on several occasions applied to the president of the company for leave to examine their records, with a view to the amount of the company's income and to the disposition made of it. This application the president at first evaded and finally denied. He said he would not give the bondholders a club to break his own head with, and denied that the trustee was the proper person to make the application. This response can not be justified. Of all men, the trustee, in the discharge of his duty, was the proper person to make the examination asked. It was not only his right, but his duty, to make it; and the president's letter denying him the privilege was unjustifiable. If the company's records were honest and fair, and if they meant to deal righteously by the trustee and bondholders, and had really done so, it is difficult to see how the information sought could be "a stick to break anybody's head with." To persons thus withholding necessary and proper information, courts will apply the maxim, *Omnia præsumuntur contra spoliatores*.

The answer, too, is in some respects a little evasive. In attempting to meet the charge of threats and of attempts to decri the value of the bonds in the market, it cautiously and guardedly denies that the company's officers, "*as such officers*" have done these things. To do so could hardly, under any circumstances, be official acts.

The attempt, in the defendant's answer and affidavits, to excuse the non-payment of the interest in question, I think is entitled to little weight. Even honest inability to pay a debt is a poor excuse when one is sued for it. But here, as it seems to me, a still poorer excuse is attempted by averments that the company have had to provide for other roads with which they have in some way consolidated, and, to effect this, have expended and must expend large sums of money,—mat-

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ters with which the bondholders have nothing to do. Thus it is urged (by way of excuse, I suppose) that the company, at great expense, in 1861, had constructed an addition to their road from Logansport to Valparaiso; that to stock their road thus extending from Richmond to Valparaiso, they purchased rolling stock to the value of three hundred and seventy thousand dollars; that afterwards a still more important extension of the road was effected, so as to make a continuous line to Chicago by a union with other roads, at a cost of about one million five hundred thousand dollars; and that to equip this long road, as it must be equipped, will cost about one million five hundred thousand dollars more. Here, then, is an aggregate of about three million three hundred and seventy thousand dollars with which the different companies succeeding to the ownership of the New Castle and Richmond Railroad have burdened themselves. And by the answer it seems to be implied that this furnishes some excuse why the interest in question remains unpaid, or at least why a receiver should not be appointed. To my mind this is no excuse. Whatever the Air-line Road did in this regard, was done at its risk; and if by assuming such burdens, it became the less able to pay the interest, this is, I think, one reason for appointing a receiver.

But the most remarkable feature in the answer, as it seems to me, is, that it does not, that I can see, present any feasible scheme for paying this interest at all. Indeed, so far as appears from the answer, it does not seem that the interest will ever be paid voluntarily. A strong desire is evinced to extend the road and raise vast sums for equipping it; but no corresponding anxiety is shown to do anything for the first mortgage bondholders. The answer evidently evinces a design to postpone this matter till the very last.

Under all the circumstances, I think the appointment of a receiver would be very proper, if the bill had averred that the mortgaged property was not a sufficient security for the debt; and that, without a receiver, the bondholders are in danger of

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irreparable injury. I suppose that in no case of a mortgage ought a court of chancery to appoint a receiver, if the mortgaged property is of such value as to render it clear that, on a foreclosure and sale, the debt could all be made. In the present case, the mortgaged property would probably not bring so much on sale.

I will therefore appoint a receiver, whose duty it shall be to examine the books and affairs of the road, to ascertain its net earnings monthly, to receive one-fourth of the net earnings of the road from Richmond to Logansport from the company every month, and to pay it into this court for the use of the bondholders. And I order that the company, its officers and agents, give to such receiver all proper facilities for examining the books and papers of the company touching the gross and net incomes and earnings of said part of said road; and that the company, by their proper officer or officers, do under oath render full and fair monthly statements to such receiver of the gross and net income and earnings of said part of said road, and pay over to him every month said fourth part of said net proceeds.

For opinions in this case consult *Bill vs. New Albany, &c., R. R. Co.*, Vol. 2 of this Series, 890, and *Pullan, Trustees, &c., vs. Cincinnati & Chicago Air-Line R. R. Co., et al.*, May Term, 1873, to appear in subsequent volume of this Series. Opinion by DRUMMOND, J.

See further, that a corporation can only exercise such powers as are conferred or such as are necessary to carry into effect those expressly delegated. *City of Chicago vs. Rumpff*, 45 Illinois, 90.

A railroad's deed of trust operates as a mortgage. *Coe vs. Johnson*, 18 Indiana, 218.

That a corporation has no power to mortgage its franchise, without express legislative authority, see *Coe vs. Columbus, Piqua and Indiana R. R. Co.*, 10 Ohio State, 372; *Commonwealth vs. Smith*, 10 Allen (Mass.) 448.

Generally, assignees or purchasers *pendente lite* need not be made parties, and are bound by the proceedings. 1 Daniell's Chancery Pleading and Practice, 280, and note 7, where there is a large collection of authorities.

For a collection of authorities on the proposition that the appointment of a receiver is discretionary with the court, see 2 Daniell's Chancery Pleading and Practice, 1715, and notes *et seq.*—[Reporter.

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NORTHWESTERN CAR COMPANY vs. JOHN W.
HOPKINS *et al.*CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTO-
BER TERM, 1865.

IN ADMIRALTY.

PETITION FOR REVIEW—WHEN MAY BE FILED.—A petition for review, filed after the term at which the decree was rendered, and after it had been executed, will be entertained by a court of admiralty, when actual fraud is charged, and the libellant is without fault, and would otherwise be without remedy.

This was a petition for review, charging actual fraud, and setting up that the libellant was without fault, and would be without remedy unless his petition were allowed.

Respondent demurred on the ground that the petition was not filed until after the term at which the decree complained of was rendered, and that the decree had been already executed.

Scammon, McCagg & Fuller, for petitioner.

Robert Rae and *John A. Jameson*, for respondent.

DAVIS, J.—This petition presents this question: Has a court of admiralty a right to entertain a petition for review after the term has passed, and after the decree has been executed?

The right is denied, and chiefly on the ground of a want of precedent. The authority of precedent is very strong, but not always conclusive. I can perceive no good reason why a court of admiralty, in a proper case, should not exercise the power of reviewing its own proceedings. It may be necessary for the proper administration of justice, and especially in cases

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where important rights are adjudicated without personal notice, which is permitted under our rules. The court could not entertain a petition on the grounds of mere oversight or neglect. But where actual fraud is charged, and the petitioner is without fault and without remedy, it would be a denial of justice to dismiss it.

Lord Stowell and Judges Story and Sprague all thought that there were cases in which petitions for review should be retained, although conceding the absence of precedent.

Judge Story said that "where, by after-acquired evidence, it were plain that the merits had not been considered, it was right to entertain a bill for review."¹

The remedy by petition for review, in the case before the court, is a proper one, and the demurrer will be overruled.

The cases referred to as containing the opinions of Lord Stowell and Justices Story and Sprague, are: *The Fortitudo*, 2 Dodson, 58; *The Steamboat New England*, 3 Sumner, 495, and *Janvin vs. Smith*, 1 Sprague, 13,—in which cases it was held that the power of granting a review by libel in the nature of a bill of review is not limited to the term at which the original decree was rendered.

In the case of *The Martha*, however, 1 Blatchford & Howland, 151, Judge Betts ruled that the court had no right to reverse a decree, subsequent to the term at which it was entered, and that a rehearing could not be granted except with the free consent of all parties to be affected by it.

Consult also *The Monarch Bell*, 1 Wm. Robinson, 21; 2 Conkling's U. S. Admiralty, 360 367; *The Enterprise*, 2 Curtis C. C. R., 817.—[Reporter.

¹ The Steamboat New England, 3 Sumner, 506.

JOHN MOTT vs. WILLIAMSON W. WRIGHT.

CIRCUIT COURT.—DISTRICT OF INDIANA.—NOVEMBER
TERM, 1865.

1. **LAW MERCHANT NOT BINDING IN INDIANA—RIGHTS OF INDORSEE.**—By the law of Indiana, ordinary promissory notes are not governed by the law merchant. But, as a general rule, the indorsee, having first used due diligence by suit to collect such notes from the maker, has his recourse on the indorser.

2. **INDORSEMENT GOVERNED BY *Lex Loci*.**—The indorsement of a note is a new, distinct contract; and such contract is governed by the law of the place where it is made, without regard to the law of the place where the note was made.

3. **LEX LOCI CONTRACTUS—DELIVERY.**—The contract of indorsement includes two essential things: the writing itself, and the delivery of it to the indorsee. And if the indorsement is written in one state, and delivered to the assignee in another, the law of the latter state controls the contract.

4. A indorsed notes in Indiana, and sent them by mail to B the indorsee, in New York, where B received them. *Held*, that the indorsement was governed by the law of New York.

Barbour & Howland, for plaintiff.

McDonald & Roach, for defendant.

MCDONALD, J.—This is an action of assumpsit on ten promissory notes, all dated in May, 1861. Four of them are payable six months after date, and six of them, seven months after date. Their aggregate is \$5,219.90. They are all dated at the city of New York, and are made payable at the Bank of North America in that city. These notes were executed by John Wright to the defendant, Williamson W. Wright, and were by him indorsed in blank.

Non-assumpsit is pleaded; and the trial of this issue is by agreement, submitted to the court without a jury.

Mott vs. Wright.

It would be tedious to detail all the testimony. The following is the substance of the evidence:

The notes and their indorsements were produced in evidence. For some time before they were made, John W. Wright was largely indebted to Robert Ellis, of New York. The debt evidenced by these notes had been kept afloat by what are called "renewal notes" made to Ellis. Of these, the notes sued on are the last series. To procure them, Ellis sent his agent from New York to the residence of the maker and indorser in Indiana, with the notes then blank, to get them executed and indorsed. John W. Wright being then abroad, the agent called on Williamson W. Wright, the defendant, who, at the agent's request, indorsed the notes. Thereupon, the agent left the notes in this condition with D. D. Pratt, an attorney of Indiana, with the request to him that he should ask the said John W. Wright to sign them and forward them to Ellis, in New York. Pratt did so. John W. Wright thereupon signed the notes in Indiana, and forwarded them by mail to Ellis, in New York. When the notes respectively fell due a demand for payment was properly made, and notices of their non-payment were duly given, according to the law merchant.

By the law of Indiana, the indorser of such notes as these is not liable, in consequence of their non-payment and notice thereof, to pay them. Due diligence to collect them from the maker by a suit against him must generally be used in order to fix the liability of the indorser.¹

By the laws of New York, it is otherwise. There, such notes are governed by the rules of the law merchant; and the indorser is liable, as on an inland bill.

It becomes important, therefore, to ascertain whether the indorsements in question are governed by the laws of Indiana or the laws of New York. According to the evidence, if the Indiana law prevails, the plaintiff can not recover, because he

¹ 1 G. & H. Stats., 448; *Kelsey vs. Ross*, 6 Blackford, 586.

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does not appear to have exercised the diligence which that law requires. But if the law of New York is to govern in this matter, then it is plain that the finding must be for the plaintiff.

It is settled in Indiana that the indorsement of a note is a new, distinct contract, and is governed by the law of the state in which the indorsement is made, and not by the law of the place where the note was executed.¹

The only question, then, is, Were these indorsements executed in Indiana or New York?

The execution of an indorsement—and indeed of every written contract—includes, in legal contemplation, two essential things; the actual writing and signing of the instrument, and the delivery of it thus written and signed.

In the case at bar, it is very clear that the writings on the back of the notes were made by the defendant in Indiana. But to make those writings of any validity as a contract between the parties, they must have been delivered.

Upon the evidence, were these notes, thus indorsed, delivered to Ellis in Indiana or in New York?

It is a well-settled rule of law, that “a note has no binding effect until it is delivered. So, when indorsed by the payee. * * * No matter when or where notes are signed; they are *made* at the time and place, and by the act, of delivery accompanied by acceptance.”² The same rule must apply to the indorsement of notes, because the reason is the same. Well may we therefore say, that no matter when or where an indorsement of a note is made, in legal contemplation the indorsement is *executed* by the act of delivery to, and the acceptance of, the indorsee.

In this view, the discussion seems to be narrowed down to the following inquiry: Was the act of John W. Wright in

¹ Hunt vs. Standart, 15 Indiana, 33; Rose vs. Parke Bank, 20 do., 94.

² Edwards on Bills, 187; Hyde vs. Goodnow, 8 Comstock, 266.

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inclosing the notes, filled up, signed by him, and indorsed by the defendant, in a letter directed to Ellis in New York, and in placing the same in an Indiana postoffice, a delivery of the notes and indorsements to Ellis, and an acceptance of them by him? In view of the evidence, I can not think that, in legal contemplation, it was. The notes, as indorsed, were "renewal notes." The acceptance of them would, I think, under the circumstances proved, have operated to extinguish the old notes in the place of which they were given. When they were received by Ellis, in New York, he might, so far as I can see, have refused to accept them, and held on to the old notes. But when they came to his hands and he determined to take them in satisfaction of the old notes, the new notes with the indorsements on them were, I think, then and there, in legal contemplation, delivered and accepted. And I am inclined to the opinion that neither the notes nor the indorsements on them had any legal existence till that moment.

It has been suggested by counsel for the defendant, that if these notes had been lost on their way to New York, the plaintiff might have sued on them as lost instruments. But this, I rather think, is begging the question. He might have sued on them, under such circumstances, if there had previously been a legal, valid delivery and acceptance of them; otherwise, not.

From the evidence, I conclude that the arrangement between Ellis and John W. Wright was substantially this: that if the latter would send to the former certain notes well indorsed, he would receive them in lieu of the notes he then held of John W. Wright; and that till he did so receive them, the arrangement was not consummated. Moreover, till Ellis had actually received these notes, he could not have negotiated them, as he did, to the plaintiff. The notes, as we have seen, were indorsed in blank, and were negotiated to the plaintiff by actual delivery. Indeed, they could not have been transferred to him in any other manner.

Besides, it may well be asked whether, if these notes had

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been lost on their way to New York, Ellis would have been bound to deliver up the old notes as satisfied by the receipt of the new. I think that, in such a case, he might have maintained an action on the old notes. It should seem unreasonable to hold that the old notes were extinguished before the new were actually received and accepted.

The case of *Cook vs. Litchfield*, 9 New York, 279, appears fully to sustain the foregoing view. That case was much like the present. In both, the defendants were accommodation indorsers, and indorsed, out of the state of New York, notes payable in it. In the case referred to, the court say "the defendant indorsed the notes for the accommodation of the maker. This appears from the fact that the notes came from the possession of the maker and not of the indorser, and were first negotiated in New York, and apparently for the benefit of Carew, the maker. So long as they remained in Carew's hands, there was no liability on the part of the indorser. The indorser's contract, therefore, must be regarded as having been made in New York, where the notes were delivered to Ryckman [the first indorsee] and the indorsement first became effective. The law of Michigan [where the indorsement was made] has no application to the case. The contract having been made in New York, the law of New York governs the case with respect to the sufficiency of the notice."

With some doubt as to the justness of the views above expressed, I am inclined to think that, on the evidence, the law is with the plaintiff.

Finding for the plaintiff accordingly.

An assignment of a negotiable instrument is a new contract between the assignor and assignee, and is governed by the law of the place where it is made. *McClintock vs. Cummins*, 8 McLean, 158.

The doctrine of *lex loci* is thoroughly discussed by Judge Story in his work on Conflict of Laws, §§261-272, and §§816, 817, where he says that it is clear, upon principle, that the indorsement, as to its legal effect and obligation, and the duties of the holder, must be governed by the law of the place where the indorsement is made.

In the case of *Williams vs. Wade*, 1 Metcalf, 82, which was an action in

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Massachusetts upon a note made and indorsed in Illinois, it was held that the plaintiff could not recover against the indorser; it not being shown that he had taken those proceedings against the maker which, in Illinois, are essential before a recovery can be had against the indorsee. Chief Justice Shaw, in delivering the opinion in that case, says: "The note being indorsed in Illinois, we think that the contract created by that indorsement must be governed by the law of that state. The law in question does not affect the remedy, but goes to create, limit and modify the contract effected by the indorsement. In that which gives force and effect to the contract and imposes restrictions and modifications upon it, the law of the place of contract must prevail, when another is not looked to as a place of performance."

In the case of a bill drawn and indorsed in New Granada, payable in New York, it was held in *Everett et al. vs. Vendryes*, 19 New York, 436, that as between the drawer and indorsee the law of the place of payment should govern, though as between indorser and indorsee the law of the place of indorsement would control. Consult also *Aymar vs. Sheldon*, 12 Wendell, 439.

The only case within our knowledge asserting a contrary rule is *Roosa vs. Crist*, 17 Illinois, 450, which was an action by the indorsee of a promissory note, payable to bearer, transferred by delivery in New York, where such a transfer is good and passes the legal title; by the law of Illinois the indorsement must be by writing and upon the instrument itself. The court held that the law of the forum must govern, and that the plaintiff could not sue in his own name. The court, however, in that case seem to overlook the distinction between the *mode* in which relief will be administered and the *legal status* of the parties, and one of the three judges, in a dissenting opinion, insists upon what is certainly the general rule and the current of authority, that the effect of the negotiation by delivery in New York was to transfer the legal title to the plaintiff, and by the law of comity he may sue in this state in his own name, adopting the forms of remedy afforded by the local law.

For further authorities that the place of contract and delivery is to govern, see 2 Parsons on Notes and Bills, 327, note z.

Consult *Trimbey vs. Vignier*, 1 Bingham's New Cases, 151, 159; 27 English Common Law, 584, where, in a suit by the holder of a bill of exchange made and indorsed in blank in France, but without the formalities required by the civil code, it was held that no recovery could be had in the English courts, as the contract was governed by the laws of France.

See also *De La Vega vs. Vianna*, 1 Barnewall & Adolphus, 284; 2 Kent, 458-463, and cases there cited.—[Reporter.

THE UNITED STATES vs. JAMES FISLER.

DISTRICT COURT.—DISTRICT OF INDIANA.—NOVEMBER
TERM, 1865.

1. **INDICTMENT—FORGED TREASURY NOTES AND POSTAL CURRENCY.**—An indictment for possessing forged treasury notes and postal currency with intent to pass them, must profess to give, and must actually give, exact copies of them, or allege a reasonable excuse for not doing so. *Quere*, whether in such a case it is sufficient to paste the forged instruments themselves on the indictment as a part of it?

2. **PARTICULARITY IN INDICTMENT.**—To charge in the indictment in such a case, that the prisoner had in possession “divers” such forged instruments, is too indefinite. The number ought to be stated.

MCDONALD, J.—This is an indictment for the felonious possession of forged United States treasury notes and forged United States postal currency, with intent to pass them. The prisoner was tried by a jury at the present term, and a verdict of guilty was returned against him. He now moves in arrest of judgment, on the ground that the indictment is materially defective.

There are two counts in the indictment. The first count charges the felonious possession of forged postal currency; the second avers the felonious possession of forged treasury notes.

In other respects, the counts are alike.

In the first count it is charged that, on the 15th of November, 1864, in this district, the prisoner “unlawfully and feloniously did have and keep in his possession, and conceal, with intent to pass, utter, and publish as true, divers false, forged, and counterfeit fractional notes commonly called postal currency, in imitation of the postal currency, which, before the day and year aforesaid, had, by the Secretary of the Treasury of the United States, been furnished to the assistant treasurers and other depositories of the United States by him selected,

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called and known as fifty-cent stamps of the postal currency of the United States—which said false, forged, and counterfeited fractional notes, commonly called postal currency, each of them are in substance described as follows:” Here is pasted on the indictment one of the supposed forged fractional notes.

The second count, in the same language as the first, charges the felonious possession of “divers false, forged, and counterfeited treasury notes, and each of them are in substance described as follows, that is to say:” Here is pasted on the indictment one of the supposed forged treasury notes.

It is objected that both these counts are bad, because they profess to give the substance of the notes only. And it is insisted that, in charging forgery, the indictment must not only set out, but must profess on its face to set out, an exact copy of the thing forged, or must state some valid reason for not doing so.

This objection is fatal to the indictment. There is nothing better settled than that the rule in such cases requires exact copies of forged instruments to be given, and to purport on the face of the indictment to be given. The indictment in such cases generally employs such language as this: “to the tenor and effect following;” or, “in the words and figures following;” and it will never do to say “in *substance* as follows.”¹

It is also urged as a ground for arresting the judgment, that both the counts are defective for not stating the number of the forged notes mentioned. Indictments ought to be characterized by a reasonable certainty of allegation. They should at least be as certain as a declaration at common law should be. It is a rule in civil pleading at common law, that when the action concerns different things, they must be described by quality, quantity, and number.² Unquestionably a declara-

¹ The State vs. Atkins, 5 Blackford, 458; Wharton's Criminal Law, §§306, 308, 1468.

² Stephen on Pleading, 206.

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tion in trespass for taking or destroying divers chattels—for example, divers horses or cows—would be bad as not stating the *number* of them. Surely the reason is equally strong for requiring that the number of these forged instruments be stated. Yet the indictment does not attempt to give the number. It only says “*divers* false, forged, and counterfeit fractional notes”—“*divers* false, forged, and counterfeit treasury notes.” It is not pretended that in either civil or criminal pleading, the evidence must strictly conform to the allegation of number. In most cases, we may aver one number and prove another without a fatal variance. But some number must, in such cases, be stated.

To say the least, it is doubtful whether to paste the original forged instrument on the indictment as a substitute for a copy, as was done in this case, does not render the indictment defective. It is a slovenly, unlawyerlike practice, not to be encouraged by courts. It is held good in England only by virtue of the act of 7 *Geo.*, 4, not in force here.³ But at any rate, the attaching of the forged instrument does not aid the statement that it is “in substance as follows.”

The judgment must be arrested. The prisoner must be held in custody or on bail to answer to a better indictment.

As to the particularity required in an indictment, consult *ante* page 26, and cases there cited.—[Reporter.]

³ *Rex. vs. Harris*, 7 Car. & P., 429.

THE MORNING STAR.

DISTRICT COURT.—DISTRICT OF INDIANA.—MAY TERM, 1866.

IN ADMIRALTY.

1. What degree of care must be used on rivers in the navigation of steam-boats, in order to avoid collisions?

2. TOW-BOAT DOES NOT VIOLATE HER LICENSE BY CARRYING A SINGLE PASSENGER.—Under the navigation laws of the United States requiring different licenses for passenger boats and tow-boats, a boat licensed as a tow-boat does not violate those laws by carrying a single passenger, and does not, for that cause, lose her redress for an injury done her by a collision.

3. DUTY OF TUG IN A FOG.—A steam-tug is not within the rule prescribed by the board of supervising inspectors under the act of Congress requiring a steamer when running in a fog to sound her fog whistle. But it may often be her duty to do so under general principles of admiralty law.

4. RULES PRESCRIBED BY BOARD OF SUPERVISING INSPECTORS NOT EXCLUSIVE.—The rules prescribed by the board of supervising inspectors touching necessary care in navigation are not exclusive. Under the general maritime law there are many other rules equally imperative.

5. NEGLIGENCE—APPORTIONMENT.—If the navigators of a vessel by their negligence directly contribute to her injury by a collision, her owner cannot recover the full amount of his loss. If both boats are in fault, the damage is apportioned.

6. LOOKOUT.—*It seems* that, in navigating our rivers, a lookout at the stern of the vessel is not required, except when she is backing.

7. ESTIMATING DAMAGES.—In measuring damages in a case of collision, all the direct and immediate consequences should be considered.

8. DAMAGES FOR DETENTION.—In settling the amount of the damages in a case of collision, the detention of the injured vessel while undergoing repairs ought to be regarded.

9. A steamer, while towing four barges laden with goods, suffered an injury by a collision with another steamer. The libel did not state to whom the barges and the goods they carried belonged. *Held*, that the libellant could not recover for the delay to the barges and their lading occasioned by the collision.

10. INTEREST—WHEN ALLOWED.—On damages sustained by a collision, interest should be allowed from the day on which the injury happened till the day when judgment is rendered for them.

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T. D. Lincoln, for libellant.

T. W. Gibson, for respondents.

McDONALD, J.—This is a proceeding to recover for a steam-boat collision on the river Ohio.

John Cobb, the libellant, charges that on the 31st of October, 1864, he was the owner of the steamer *Crescent City* engaged in the carrying trade on the rivers Ohio and Mississippi; that while in that business, and while his boat was being landed at Dixon's Bend, about three miles below the city of Evansville, the steamer *Morning Star* collided with the *Crescent City*, damaging her to the amount of eight thousand five hundred dollars; and that this collision was occasioned by the negligence of the managers of the *Morning Star*.

Zachariah Shirley, the president, and Joseph H. Bruce, the superintendent, of the Louisville and Evansville United States Mail Line Company, intervene for themselves and for the owners of the *Morning Star*, and answer, admitting the collision, but denying the negligence charged, and averring that the collision was caused solely by the negligence of the persons in charge of the *Crescent City*, and claiming that damage done to the *Morning Star* by that collision ought to be adjudged against the libellant.

The evidence in the cause is very voluminous, and, in several points, very conflicting. I gather from it the following facts:

On the night of October the 30th, 1864, both the boats lay at the Evansville wharf. Both were bound on voyages down the Ohio. The *Crescent City* had in tow four or five hay and coal boats. At about five and a half o'clock next morning, she pursued her way down the river about three miles into Dixon's Bend, where, discovering before her a heavy fog, she stopped her wheels preparatory to landing on the Kentucky side. She had been running about seven miles an hour.

Soon after her departure from Evansville, the *Morning Star* also followed, running about twelve miles an hour, and

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overtook the Crescent City about three miles below Evansville.

The Crescent City was built for a tow-boat; the Morning Star was a very swift passenger boat. Each was duly licensed,—the one as a tow-boat, the other as a passenger boat.

From the time the boats left Evansville till the collision, no person on either boat saw the other boat till a moment before the accident.

The morning was clear and fine. There was little fog on the river above the place of the collision. Both boats had a full complement of officers and men. Neither of them sounded a fog whistle before the collision. Neither of them had a stern lookout. On the Crescent City, Brasher, the pilot, was at his proper place, and Bush, the captain, was standing on the deck just before the pilot-house, both keeping a careful observation ahead. On the Morning Star, the pilot, Daulley, was the only lookout, and was at his proper place. It was at that hour the turn for Barr, the mate, to keep a lookout ahead; and on leaving Evansville he took his proper place for that purpose; but sometime before the collision he abandoned his post, went into the texas, and remained there till the accident happened.

The bank of fog in Dixon's Bend could plainly have been seen by the lookouts on each boat when they were from a quarter to a half mile above it. At the time of the collision, the Crescent City had been floating with her wheels stopped, in the upper edge of this bank of fog, about five minutes, and was in the usual channel, about one hundred feet from the Kentucky shore. At the moment of collision, the proper officer was just about to ring up the hands to land her. The river at that point was about a half mile wide, and the channel about three hundred yards wide. The Morning Star, without checking her speed, ran into this bank of fog; and at the moment of doing so, her pilot discovered the Crescent City just ahead, and instantly rang his bell to stop; but it was too late. The ringing and the collision were nearly simultaneous. The Morning Star struck the Crescent City with great force, five or six feet forward of the stern-post on the

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starboard side, carrying away the after-guard, staving in the hull a few inches above the water some twenty feet in length, carrying away the water-wheel beam, plumber block, gallows frame, and starboard wheel, and was checked up on the after end of the cylinder timbers. The disabled boat was immediately landed on the Kentucky shore, and the Morning Star, after pausing a few minutes, pursued her way down the river. Both boats were somewhat injured by the collision; but the injury to the Crescent City was far the greater.

I think that the evidence satisfactorily establishes all the foregoing facts. And from them two inquiries arise, namely: Did any fault on the part of the managers of the Morning Star directly contribute to the collision? Did any fault of those on board of the Crescent City directly contribute to it?

I. As to the Morning Star: We have seen that, though the Morning Star, in passing from Evansville to the place of the collision, must have been most of the time in sight of the Crescent City, and a part of the time very near her, yet no person on the former boat saw the latter that morning till a moment before the accident. How shall we account for this remarkable fact? The morning was bright. Daylight had dawned when the first boat rounded out from the Evansville wharf. There was scarcely any fog between that wharf and the place of the disaster. The river there is straight enough to give an unobstructed view in most places through a distance of a mile. At the sharpest bend there, the view of the channel is unobstructed for at least a quarter of a mile. The Crescent City was not in the fog over five minutes. The collision occurred about sunrise. In view of these facts, it seems to me certain that if any lookout on the Morning Star had diligently watched ahead, he must have seen the Crescent City nearly all the way down till she entered the fog bank. For a portion of the way, the boats, while yet both in a clear atmosphere, must have been in close proximity. To me it is evident that the only possible reason why the Crescent City was not seen, before she entered the fog, by the pilot of the

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Morning Star, is that he omitted properly to look ahead. If he had looked before him, he would undoubtedly have seen the Crescent City, and have avoided the disaster. The omission to do so was gross negligence, and contributed directly to the collision.

Now, it is clear that at the time of this collision, and for sometime before, the only lookout on the Morning Star was the pilot, Daulley. The captain, Bruce, was in bed, asleep. Barr, the mate, whose duty it was to be on the lookout, tells us himself that he "went into the texas when the boat got straightened down the river between the wharf-boat and the mouth of Pigeon Creek." He "went in to change his boots." He left no one to watch in his place. He remained in the texas till the collision. He says he was in the texas before the accident while his boat ran half a mile; and I think the evidence shows it is a good deal more than half a mile from the mouth of Pigeon Creek to the place of the collision; it is probably more than two miles. All this time he was neglecting his duty; and this neglect was manifestly a proximate cause of the disaster.

But even if Daulley and Barr had both been at their proper places and keeping a vigilant lookout, I think the Morning Star is chargeable with gross negligence in plunging into the fog bank at the speed at which she did, without giving any notice of her approach. The counsel for the respondents insists that the Crescent City was enveloped in dense, impenetrable fog; and so many of the witnesses swear. Is it careful navigation for any boat, even after she has sounded her whistle, to rush, as the Morning Star did, into an impenetrable fog bank at the rate of twelve miles an hour?

There is, indeed, much contradiction between the witnesses touching the density of the fog. But, so far as the duty of the Morning Star is concerned, I do not see how the truth on that point can make any difference. She was in fault whether the fog was dense or not. If it was very dense, she acted recklessly in running into it with such speed; if it was not

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dense, her managers, if they had kept a proper lookout, would have seen the Crescent City in time to have prevented the collision.

In taking this latter view, I do not consider as important the fact proved, that under an act of Congress the proper board of supervising inspectors had promulgated a rule, then in force, to the effect that, "when a steamer is running in a fog or thick weather, it shall be the duty of the pilot to sound his steam whistle at intervals not exceeding two minutes." It is not important to inquire whether the Morning Star, at the time of this collision, was in a condition in which the spirit of this rule would reach her. For if no such special rule had existed, it would have been, on general principles of maritime law, a reckless and unjustifiable act thus to plunge into such a fog, at the rate of twelve miles an hour, without sounding the steamer's whistle or giving any other warning of her approach.

I conclude, therefore, that the negligence of the managers of the Morning Star directly contributed to the disaster in question.

Moreover, both by the evidence and the law of the land, nothing is clearer than that the pilot alone is not a sufficient lookout ahead on steamers. The evidence of several of the witnesses shows that this is true. And a high American authority declares that "in respect to a lookout, it is not enough that a person is stationed in the pilot-house for that purpose; but a vigilant watch should be placed in the forward part of the steamer, so situated as to be able to discern vessels at the earliest moment."¹ And this is settled law in the Supreme Court of the United States.² In the case of *The Europa*, 2 English Law and Equity Reports, 557, it was held that a steamer going at the rate of twelve and a half knots an hour,

¹ Parsons' Maritime Law, 198, 199.

² *St. John vs. Paine, et al.*, 10 Howard, 557; *Propeller Genessee Chief vs. Fitzhugh*, 12 do., 443.

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in a dense fog, seven hundred miles from land, must have the most complete lookout that can be adopted; and that merely one lookout on the bridge, a quartermaster on the top gallant forecastle, one at the wheel, and another at the con, was not a sufficient lookout. It may, indeed, be said that this last case differs from the 'one at bar, as being the case of a steamer navigating the ocean. But it may well be answered that there is more danger of collisions in navigating the Ohio amid a fog, where all passing boats must keep within a comparatively narrow channel, than on the ocean where the channel is as wide as the sea itself.

II. Did any fault of those on board of the Crescent City contribute to the accident?

It appears by the evidence that this steamer was fully manned. Her captain was on the lookout before the pilot-house. Her pilot was at his post giving due attention. And her engineers were both at their places promptly responding to orders. The captain especially seems to have been acting with proper care. He swears that as they proceeded from Evansville "there was a light, misty fog on the river, but not so that we considered it dangerous to run. We could easily see either shore. When we got down into Dixon's Bend, there was a heavy bank of fog ahead of us about three quarters of a mile; and we ran close in to the Kentucky shore, about seventy-five or one hundred feet from the shore, preparatory to landing. Our calculation was to stop and let her lose her headway, and then back her in. About a minute or a minute and a half after we rung our bell to stop, the Morning Star ran into us." This has the appearance of a simple, reasonable, truthful story. It is uncontradicted by any witness, and it challenges my belief. And indeed I cannot see that there is the slightest evidence of any fault on the part of the Crescent City, except in three particulars which are earnestly and ably urged by the respondents' counsel. To these we will now attend.

1. It is urged that at the time of the collision, the Crescent

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City was carrying passengers; that she was not licensed as a passenger boat according to the act of Congress; that she was therefore unlawfully in the place where she was injured; and that, consequently, she has no legal right to demand redress for that injury.

If this boat was really a passenger boat within the meaning of the acts of Congress on the subject of licensing steam vessels, it must, in view of the decision in the case of *The Maverick*, in 1 Sprague's Decisions, 23, be a very serious question whether the libellant can, under any circumstances, succeed in this cause.

But was the Crescent City "a carrier of passengers" within the purview of the acts of Congress? It is certain that she was licensed merely as a tow-boat. It is in proof by Joseph C. Small, a witness for the libellant, that he was a passenger on her. He swears thus: "I was a passenger. I got on board at Louisville, and was going to Shawneetown. I had charge of the barges on the trip before." This is all the evidence touching passengers. Does it make the boat a passenger boat within the purview of the acts of Congress? It does not appear that he paid for his passage. As he had been in charge of the barges on the last trip of the boat, it might be fair to infer that he was carried *gratis*. If what he relates makes the Crescent City a passenger boat, then every vessel, licensed merely as a freight or tow-boat, must at its peril see that no human being not an employe shall, under any circumstances, go a single mile on board of it. I have met with no authority on this point. But I think the act of Congress should receive a more liberal construction. I think that no single individual passing on a tow-boat from one point to another on the line of its voyage, whether he goes *gratis* or not, would make it a passenger boat within the meaning of the law. "One swallow does not make a summer." I suppose the law, in mentioning boats "carrying passengers," means at least more than one passenger, and probably includes such vessels only as make the carrying of passengers a business, or at least hold

themselves out to the public as such carriers. I think, therefore, that this objection ought not to prevail.

2. It is contended on the part of the defense that, under the circumstances, the "Crescent City" ought to have sounded her fog whistle.

It seems pretty clear that the rules prescribed by the board of supervising inspectors under the act of Congress which requires steamers when running in fog to sound their steam whistles, does not apply to tow-boats.¹ And if the act did apply to such vessels, it might be doubted whether the Crescent City, when she had stopped her wheels and was preparing to land, could be said to be running in fog within the meaning of said rule. Yet it may be urged with much reason that, without any special rule under said act, any vessel may be in such a condition as to make it her duty to give warning by sounding her steam whistle. Of this there can be no doubt. It were absurd to suppose that since the promulgation of the rules prescribed by the board of supervising inspectors, a due observance of all those rules includes every duty devolving on the navigators of steamers. When none of these special rules apply, the more general rules of admiralty law govern; and one of these rules is that "a plaintiff in a cause of collision must prove both care on his own part, and the want of it in the defendant."² And it is clear that if the plaintiff by his negligence substantially contributes to the collision, he must at least bear half the loss.³

It is, then, a grave question whether the Crescent City, under the circumstances of the case, omitted the exercise of proper care by not sounding her whistle, and thereby substantially contributed to the collision.

What is proper care, depends on the particular circumstances of each case. In the case at bar, it appears that when the

¹ See Act of Aug., 30, 1852, §43; 10 U. S. Statutes at Large, 61.

² 1 Parsons on Shipping and Admiralty, 520.

³ *Sills vs. Brown*, 9 C. and P., 601.

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captain of the Crescent City discovered ahead of her a fog bank, he determined to land, and was, with reasonable diligence, preparing to do so. He stopped the wheels, ran, as he swears, "close into the Kentucky shore, about seventy-five or one hundred feet from the shore, preparatory to landing," and was about to ring up the hands for that purpose when the collision occurred. All this seems to have been proper care. But his boat was in the usual channel, and was in a fog; ought then the whistle to have been sounded? This must, I think, depend, to a great extent, on the density of the fog, as the captain and pilot then saw and judged of it. There is no doubt that these two men were keeping a proper lookout; nor is there any question as to their skill. One of them thought and spoke about sounding the whistle; and he swears that he did not deem the fog so dense as to require it. A number of witnesses in the defense, indeed, testify that the fog was extremely dense. And so it may have seemed to them, and may have been, at the moment when, and the point from which, they observed it. But, on the other hand, the captain, the pilots, the first and second engineers, the carpenter, and several other witnesses, all of whom were on the Crescent City, and seem to have had fair opportunity to observe, swear that the fog in which they were was not very dense, that they could see plainly all around them, and that they could see even the shores on both sides of the river. Now as I have said in regard to the witnesses on the defense, I suppose I may justly say in relation to these witnesses, what they thus state may have seemed to be the fact, and may have been the fact, at the moment when, and at the point from which, they observed the fog. Under these circumstances, the captain and the pilot at the wheel say that they judged the sounding of the whistle to be unnecessary. It may be that they would have judged otherwise if they had seen things as the witnesses for the defense say they saw them. It may even be that they judged unwisely. It can hardly be believed that they intentionally erred. They acted, I think, on good motives and on their

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best judgment. I suppose, therefore, that, under the circumstance, they are not chargeable with any negligence in not sounding the fog whistle.

3. It is urged in defense, that the Crescent City was guilty of carelessness in not having a lookout at her stern at the time of the disaster.

Excluding from consideration the depositions on this point, taken since the submission of this cause, I think the weight of the evidence is, that the omission of a stern lookout was not, under the circumstances of the case, want of due care. Such a lookout is certainly unusual; and it appears that experts deem it unnecessary, except when the steamer is backing or running astern. Nor do I see how, if there had been such a lookout, he could have prevented the collision. I think there is nothing in this point.

It remains only to settle the amount of damages in which the "Morning Star" ought to be condemned.

In measuring damages in a case of collision all the direct and immediate consequences are to be taken into consideration.¹

Whether damages ought to be allowed for the detention of the injured vessel while undergoing repairs, was formerly much questioned. And the United States Supreme Court once ruled against the allowance.²

But the contrary doctrine is now settled.³

Whether, under the circumstances of the present case, anything ought to be allowed for the detention of the four boats which the Crescent City had in tow at the occurrence of the disaster, may be a question of doubt. The libel alleges that the libellant was the owner of the Crescent City; but it fails to tell us who owned the barges she had in tow. Its only averment on the point is, "that at the time of the said injury,

¹ 1 Parsons on Maritime Law, 204.

² Smith *vs.* Condry, 1 Howard, 28.

³ Barrett *vs.* Williamson, 4 McLean, 589; Williamson *vs.* Barret, 18 Howard, 101; 1 Parsons on Maritime Law, 204, Note 2.

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the said Crescent City had four barges in tow,—three loaded with hay, and one with coal,—which were being taken to Memphis to be delivered to the United States Government there.” From this language, I rather infer that these barges with their contents were the property of the Government; and, if so, I think it clear that the libellant can not recover for their detention. Therefore, I shall allow nothing for the detention of the barges.

As to the detention of the Crescent City for necessary repairs, I have no hesitation in allowing damages. To determine how much ought to be allowed for this is, however, a little difficult. On this point there are but two witnesses, Capt. Bush, and the pilot, Brashier, and they differ both as to charter value per day and the time of the detention.

As to the value per day, Bush puts it at one hundred and twenty-five dollars, and Brashier at one hundred. They appear to be equally competent to judge of that question. Under such circumstances, I deem it best to follow Lord Bacon’s rule, namely, that, in a question of doubt as to value, the lowest sum shall be taken. I shall therefore allow one hundred dollars per day for the time of detention.

Touching the time during which the boat was necessarily detained for repairs, Bush says it was thirty days, and Brashier swears it was about twenty. Bush superintended the repairs every day but one, and kept the accounts, and paid the bills; and being captain of the boat, he would be more likely to know the exact time than the pilot Brashier. I think, therefore, he is the more reliable witness as to the time, and I shall follow him on this point, and allow for thirty days’ detention for necessary repairs.

Then, the amount of damages for the detention, to effect the necessary repairs, will be three thousand dollars. On this sum I will allow interest from the 31st of October, 1864, to this day,—two hundred and seventy-one dollars and fifty cents.

As to the expense of repairs, including work, materials, loss of time and boarding of crew, &c., Capt. Bush, who kept

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the account and paid out these expenses, is the only witness. He gives the various items in his deposition, and being uncontradicted, and apparently fair, I allow them as they stand on his testimony, at thirty-seven hundred and seven dollars and twenty-six cents.

On this sum I allow interest from December 1, 1864, to this day,—three hundred and sixteen dollars and forty-four cents.

The aggregate is seven thousand two hundred and ninety-five dollars and twenty cents.

I therefore assess the libellants damages at the sum of seven thousand two hundred and ninety-five dollars and twenty cents. And the proper judgment will be rendered in favor of John Cobb, the libellant, for this amount, and also for the costs of this suit.

At common law, if both vessels are in fault, neither can recover in the case, though the fault be ever so unequal; while in admiralty the loss is equally divided. See 1 Parsons on Shipping and Admiralty, 525, 526 and note 1, *et seq.*, for an exhaustive collection of authorities. If one of the colliding vessels is guilty of some fault, she must show fault in the other, and that her own negligence was not the cause of collision. *Fashion vs. Wards*, 6 McLean, 152; 1 Parsons on Shipping and Admiralty, 529 and note 2. The proper position of a lookout is generally forward, but reference must be had in all cases to the question whether the lookout could not see as well where he was as in any other position. *The Morning Light*, 2 Wallace, 550, 558; 1 Parsons on Shipping and Admiralty, 576, 577, 578. *Quare*, How far is a sailing vessel bound to keep a lookout for vessels coming up from astern? *The Emma*, Holt, 209. If the collision was not owing to the absence of a watch the vessel will not be considered in fault. *Mellon vs. Smith*, 2 E. D. Smith, 462. "Whether damages are to be allowed for the detention of the injured vessel while undergoing repairs, may not be certain; but the later, and we think the better, mode allows them." 1 Parsons on Shipping and Admiralty, 539, 540 and note 1, and cases there collected.—[Reporter.]

CHARLES H. RICE vs. JAMES MONTGOMERY *et al.*

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY TERM, 1866.

1. **FACTOR AND PRINCIPAL.**—Where a factor agreed with his principal to purchase for him fifty thousand bushels of wheat, in consideration that the latter would immediately forward to him by express ten thousand dollars, and the residue to pay for such purchase in four or five days, and where the principal wholly failed to forward the money, though the factor had immediately purchased twenty thousand bushels of the wheat: *Held*, that the factor was under no obligation to purchase the residue of the fifty thousand bushels.

2. **PLACE OF DELIVERY BY FACTOR.**—In the absence of any special agreement touching the place of delivery of wheat to be purchased by a commission merchant for his principal, the law will presume the place where the commission merchant does business to be the proper place of delivery.

3. **REASONABLE TIME.**—What is a reasonable time to send money by express from Muncie, Indiana, to Chicago, Illinois, is a question of fact for a jury. And if a declaration avers that three days are reasonable time, it is not subject to demurrer on that account.

4. **PLEADING QUANTUM MERUIT.**—An averment that the defendant promised to pay the plaintiff reasonable commission as a factor, ought to be followed by an allegation of the reasonable value of such commission.

George Gardner, for plaintiffs.

S. C. Sample, for defendants.

MCDONALD, J.—This is an action of assumpsit. To the first and second counts of the declaration, special demurrers have been filed. Every point made by them, however, if valid at all, would be reached by general demurrer. The special causes are mostly mere arguments and citations of authorities, things unusual and improper in demurrers.

The counts demurred to charge that the plaintiffs were commission merchants in Chicago, Illinois; that, in consideration that they would purchase for the defendants a large quantity

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of wheat, the defendants would, as soon as the same could be done, send to the plaintiffs from Muncie, Indiana, ten thousand dollars by express, to apply on such purchase, and pay the plaintiffs such balances of money as might be necessary to reimburse them for as much over the ten thousand dollars as the wheat might cost, within four or five days thereafter, and to pay also to the plaintiffs their reasonable charges and commissions for their services in the transaction; that, in pursuance of this arrangement, the plaintiffs immediately purchased for the defendants twenty thousand bushels of wheat, and were ready, willing and able to purchase as much more as would be necessary to fill the contract; but that the defendants failed to forward the ten thousand dollars within the time specified, and refused to accept the wheat already purchased for them, and have not paid anything on the contract.

This is substantially the case presented in both the counts, and they only differ in this, that the first count charges that the plaintiffs were to purchase for the defendants fifty thousand bushels of wheat, and the second avers that they were to purchase a quantity not exceeding fifty thousand bushels; and in this, that the first count does not expressly aver at what place the wheat was to be delivered, and the second count alleges that it was to be delivered at Chicago.

1. It is objected to the first count, that it is not stated that the plaintiffs purchased more than twenty thousand bushels of wheat for the defendants, whereas they ought to have purchased fifty thousand. This objection might be well taken if the case were a mere sale of wheat. But it is a case of agency, and not of sale. By the agreement the purchase of fifty thousand bushels was not a condition precedent. According to the count, the plaintiffs were not bound to purchase any wheat till the ten thousand dollars were sent them. This was the condition precedent in the case, and though they did purchase the twenty thousand bushels, they certainly were not bound to buy any more till they received that sum. By failing to

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forward it the defendants first violated the contract, and the plaintiffs were bound to go no further in its performance.

2. It is further objected to the first count that it does not state where the wheat was to be delivered. The count has no express averment on this point. It does, however, show that the plaintiffs were commission merchants, doing business at Chicago. And this we think sufficiently shows that the wheat was delivered there.

3. It is averred in these counts, that three days, one of which was Sunday, were a sufficiently long period for the defendants to have forwarded the ten thousand dollars to Chicago. The defendants insist that it was not a reasonable time; and that as courts officially take notice of geographical distances, this averment is defective as matter of law. We think courts must, *ex officio*, take notice of the distances between well-known geographical points in the United States. But we suppose we can not officially take notice how long it might take an express company to carry ten thousand dollars from Muncie to Chicago. The declaration avers that three days was a sufficient time. Whether this averment is true, is a question of fact for the jury, not of law for the court.

4. As to so much of the contract as may entitle the plaintiffs to pay for their costs and commissions for their services mentioned in these counts, we think the objection to this part of them is well taken. Clearly, the declaration ought to have averred, as in the *quantum meruit* counts, what these services were reasonably worth. It is averred that the defendants promised to pay the plaintiffs their "reasonable costs, charges, and commissions" relating to the contract; but failing to state the value of these, the averment is insufficient; and there can be no recovery under it in its present form.

But as each of these counts charges in good form a breach of the contract to forward the ten thousand dollars, and to pay balances due on the purchase of the wheat over and above that sum, we cannot sustain the demurrers merely on the

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ground that the averments touching the commissions, &c., are defective. These we must regard as mere surplusage

The demurrers are overruled.

For a lucid discussion of what are conditions dependent and independent, see 2 Parsons on Contracts, 529, note r.

That it is necessary in pleading *quantum meruit* and *quantum valebat* counts, to aver what services or materials were reasonably worth, see 1 Chitty on Pleading, 84.—[Reporter.

ALBERT L. MOWREY *vs.* THE INDIANAPOLIS AND
CINCINNATI RAILROAD COMPANY AND
HENRY C. LORD.

CIRCUIT COURT.—DISTRICT OF INDIANA.—JUNE TERM, 1866.

IN EQUITY.

1. TEMPORARY INJUNCTION—NOTICE.—The national courts can not order temporary injunctions, except on reasonable notice to the adverse party or his attorney.

2. CORPORATION—WHEN BOUND BY ACTS OF MAJORITY.—It is a general rule, that the acts of a majority of a body politic bind the whole corporation, when confined to its ordinary transactions, and consistent with the original objects of its formation.

3. CHANGES IN CHARTER.—When, at the time of subscribing stock in a corporation, there are existing laws by which the charter of the body politic may be fundamentally changed, such subscription must be presumed to have been made with a view to such laws, and to changes which may possibly be made conformably to them. And in such case a majority of the stockholders may adopt such changes against the will of a minority.

4. WHEN LEGISLATURE CANNOT ALTER CHARTER.—Under the provisions of the National Constitution, prohibiting the states from making any law impairing the obligation of contracts, and in cases not falling within the

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foregoing rules, no fundamental change, even though authorized by subsequent legislation, can be made in the charter of a private pecuniary corporation without the consent of all the stockholders, unless the legislature has provided otherwise in the charter.

5. **DIRECTOR—WHEN ESTOPPED BY NOT OBJECTING.**—If a member of a Board of Directors of a corporation be present at the adoption of a resolution and aware of what is being done, and makes no opposition to its adoption, he must be presumed to have assented to it. But if such proceeding be merely preliminary to a decision by a subsequent vote of the stockholders on the consolidation of the corporation with another corporation, which can only be ultimately decided by the vote of all the stockholders, and not of the board of directors, such consent so given by a member of the board of directors, who is also a stockholder, does not estop him from afterwards objecting to the consolidation.

6. **CONSOLIDATION OF RAILROAD COMPANIES—EVERY STOCKHOLDER MUST CONSENT.**—To effect a consolidation of railroad companies subsisting under special charters not providing therefor, the consent of every stockholder must be given; and any one dissenting stockholder is entitled to an injunction against such consolidation.

7. **JURISDICTION.**—In a suit against a corporation in the United States Circuit Court for the state, by a citizen of another state, service of process within the state upon a joint defendant, a citizen of a third state, gives the court jurisdiction over him.

Bartley & Burnett and *McDonald & Roach*, for complainant.

G. E. Pugh, and *Hendricks, Hord & Hendricks*, for defendants.

MCDONALD, J.—This is a proceeding in equity for an injunction. The bill was filed on the 28th of May, 1866. On the same day, the complainant, without notice to the defendants, and in their absence, moved for a temporary injunction to operate till the motion could be fully heard on due notice on a day to be fixed by the court. As the bill stated facts indicating a pressing emergency, I then ordered that the defendants should be enjoined as prayed, till, on due notice to them, the motion could be fully heard on the fifth day of June, 1866. On the latter day, all parties appeared by counsel. The defendants then moved for a dissolution of the injunction already granted; and, at the same time, the complainant moved

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for a temporary injunction till the final hearing, or till the further order of the court.

The injunction ordered on the 28th of May was decreed without much consideration on my part. I followed a practice which had long prevailed in the courts of the state of Indiana. But, on further reflection, I think my order for a temporary injunction was premature. Equity would seem to demand that, in cases of emergency, where irreparable injury would follow unless an immediate injunction were ordered, the national courts should have power to grant temporary injunctions without notice of the application for them to the party enjoined. But the act of Congress of March 2, 1793, forbids that any writ of injunction shall "be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same."¹ In view of this act, as well as of the 55th rule in equity of the Supreme Court, it should seem that no special injunction can be granted by this court but on due notice. And in the case of the *State of New York vs. the State of Connecticut*, 4 Dallas, 1, the Supreme Court has decided that an injunction can neither be granted by the United States courts, nor any judge thereof, without due notice to the adverse party or his attorney.

I, therefore, dissolve the injunction ordered on the 28th of May.

We proceed to consider the motion now made by the complainant for a temporary injunction.

By the bill, it appears that Albert L. Mowrey, the complainant, is the owner of three hundred and thirty-one thousand five hundred and fifty dollars in the shares of the capital stock of the Indianapolis and Cincinnati Railroad Company; and that the defendant, Lord, is the president of the company. The corporation exists under a special charter from the Indi-

¹ 1 U. S. Statutes at Large 335.

ana Legislature, granted before the adoption of the constitution of 1851.

The bill alleges that a negotiation has lately been set on foot to consolidate said company with the Lafayette and Indianapolis Railroad Company. To this consolidation it appears that the latter company has already consented. And it further appears that the Board of Directors of the Indianapolis and Cincinnati Railroad Company have called a meeting of their stockholders to obtain their consent to the consolidation.

The bill charges that, on the 10th of May last, certain articles of consolidation were agreed to and signed by H. C. Lord, T. A. Morris, and W. Wright, a committee on the part of the Indianapolis and Cincinnati Railroad Company, and by W. F. Reynolds, a committee on the part of The Lafayette and Indianapolis Railroad Company. A copy of these articles is exhibited; and they purport to be the work of the boards of directors of the two companies, "by and with the assent of their respective stockholders." Among other things, these articles provide for the issuance by the consolidated company of bonds to the amount of two million eight hundred thousand dollars, of which two millions and a half are to be delivered to said Reynolds in trust, first, to pay all the expenses of such trust; second, to pay all the legal liabilities of the Lafayette and Indianapolis Railroad Company for their stock; third, to pay such stockholders of the Indianapolis and Cincinnati Railroad Company as desire to exchange their stock for these bonds. The articles provide that, after these payments, the residue of the bonds shall be appropriated in various ways unimportant to the present decision to be stated.

The bill also charges that in 1865 a corporation was organized to construct a railroad from Indianapolis to the Indiana state line in the direction of Danville, Illinois, by the name of The Cincinnati, Indianapolis, and Danville Railroad Company; that, at the instance of the defendant Lord, the complainant subscribed two hundred thousand dollars to

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the capital stock of that company, and other persons subscribed thereto one million eight hundred thousand dollars; that Lord, and the directors of the Indianapolis and Cincinnati Railroad Company, and the directors of the Lafayette and Indianapolis Railroad Company, are attempting to effect the said consolidation, with the fraudulent design to break down the Cincinnati, Indianapolis, and Danville Railroad Company, and render the complainant's stock therein worthless; that by issuing said bonds, the defendants intend to buy up therewith all the stock so, as aforesaid, subscribed to the road last aforesaid, except the two hundred thousand dollars subscribed by the complainant; and that with a view to that object, the said Lord has already, as President of the Indianapolis and Cincinnati Railroad Company, actually bargained for a considerable portion of the stock of the Cincinnati, Indianapolis, and Danville Railroad Company, agreeing to pay therefor said bonds when they shall be issued.

To all these doings the complainant objects as frauds on his rights; and he especially objects to said consolidation, insisting that the same can not be legally effected without his consent.

I lay no stress on the averments in the bill touching the Cincinnati, Indianapolis, and Danville Railroad Company. That company is not a party to this suit; and if it were, I think the matters relating to it and its stock are not proper subjects of consideration in a bill whose principal object, evidently, is to enjoin the consolidation of two other railroads. Indeed, I suspect that to unite all these matters in one bill might make it multifarious.

Nor do I deem material any inquiry into the policy of the proposed consolidation. Whether such a consolidation would be beneficial or injurious to the stockholders in general, or would favorably or unfavorably affect the complainant's stock in particular, are matters to be considered and determined by them alone. The only question for the court is a question of power. Have these corporations the power to consolidate

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against the will of one of the stockholders? If they have, we will not disturb them in the exercise of that power; if they have not, we are bound to forbid its exercise.

The statute of Indiana, on the subject of the consolidation of railroad companies, gives the power to consolidate in general terms, without any provision as to the consent of stockholders.¹ While, therefore, the general power of consolidation without doubt exists in this state, yet, whether such consolidation—especially in the present case—can be legally effected, without the consent of all the stockholders, cannot be determined by any Indiana statute, but must depend on general principles of law.

We have seen that the complainant is a stockholder in the Indianapolis and Cincinnati Railroad Company to the amount of three hundred and thirty-one thousand five hundred and fifty dollars. He insists that by virtue of this interest he is entitled to object to the proposed consolidation, though every other stockholder in the two companies should desire it. If in this he is right, the injunction must be granted; otherwise, not. And this is the great question in the case.

It is certain that the proposed consolidation, if effected, would work a material and fundamental change in the corporation in which the complainant holds his stock. Nay, it would extinguish that corporation; for it is well settled that the consolidation of two railroad companies under the Indiana statute extinguishes them both; and that the consolidated institution is a new corporation, distinct from both the old ones out of which it was formed.²

I think the following propositions may be laid down as clear law.

1. It is not to be doubted that, as a general rule, the acts of a majority of a corporation are binding on the whole, when

¹1 G. & H., 526.

²The State vs. Bailey, 16 Indiana, 46.

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confined to its ordinary transactions, and consistent with the original objects of its formation.¹

2. In all cases, where at the time of subscribing stock in a corporation, there are existing laws by which the charter of such corporation may be fundamentally changed, such subscription must be presumed to have been made with a view to such laws and to changes which may possibly be made conformably to them; and in such case, a majority of the stockholders may adopt such changes against the will of a minority.²

3. Under the provision of the National Constitution prohibiting the states from making any "law impairing the obligation of contracts," and in cases not falling within the proposition last above stated, no fundamental change, even though authorized by subsequent legislation, can be made in the charter of a private pecuniary corporation, without the consent of all the stockholders, unless the legislature has provided otherwise in the charter.³

The defendants' counsel have argued that the case of *Clearwater vs. Meredith*, 1 Wallace, 25, is opposed to the last of these propositions. But I think that case sustains it. In *Clearwater vs. Meredith*, the question of the consolidation of two railroad companies was discussed. Clearwater was a stockholder in one of these roads. And Mr. Justice Davis, who delivered the opinion of the court, said that "Clearwater could have prevented this consolidation had he chosen to do so."

The only American case which I have found, and which seems opposed to this proposition, is that of *Lauman vs. The Lebanon Valley Railroad Company*, 30 Pennsylvania State, 42. This case decides that a single stockholder has no right

¹Troy & Rutland Railroad Company vs. Kerr, 17 Barbour, 581, 604; 1 Kyd on Corporations, 422; Angell & Ames on Corporations, pp. 58 and 396, (2d ed.)

²Bish vs. Johnson, 21 Indiana, 299.

³2 Redfield on the Law of Railways, 575, 576.

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to object to the consolidation of the company in which he holds stock, with another railroad company. The learned chief justice who pronounced this decision cites no authority in support of it. His reasoning on it seems to me not very satisfactory. It may be right under Pennsylvania laws touching railroad corporations. But it is singularly inconsistent with the judgment rendered in the case, which was that the complainant could not be made a stockholder against his will in the consolidated company; and that the consolidation should be enjoined till he was secured in the payment of the value of his stock. Why enjoin the consolidation at all, if he had no right to object to it. His objection in that case seems to have been pretty effectual.

There is, indeed, a dictum in the case of *The State vs. Bailey*, 16 Indiana, 46, which seems to favor the Pennsylvania doctrine above mentioned. It is to the effect that in the case of the consolidation of two railroad companies, "those stockholders in the old who do not enter the new, are entitled to withdraw their shares in the capital stock, and may enjoin till they are secured." This may be true, if the objecting stockholder should choose to adopt that course. But is he bound to adopt it as his only remedy? Is he bound either to sell out his stock in this way, or to abandon it, or to become a stockholder in the consolidated company? Would not forcing him to either of these alternatives be a violation of his contract? Directly opposed to the case in 30 Pennsylvania State, and to the dictum in 16 Indiana, so far as these maintain the doctrine that a single stockholder has no right to object to a consolidation, is the well-considered case of *Stevens vs. The Rutland & Burlington Railroad Company*, 29 Vermont, 545. This case expressly decides that any stockholder in a railroad corporation may have an injunction against the other corporators to prohibit any fundamental change in the original purpose of the act of incorporation, though the proposed change be authorized by an act of the legislature. And, in perfect agreement with this ruling, it is

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well settled in Indiana, that the consolidation of two railroad corporations, against the consent of a subscriber of stock to one of them, releases him from the payment of the stock thus subscribed.¹ These cases proceed on the just view that the relation between a stockholder and the corporation is one of contract; and that every fundamental change in its charter, made against his consent though on the authority of a subsequent act of the legislature, is a violation of that contract, and is forbidden by the National Constitution. Now if, as is the rule in Indiana, a consolidation against the will of a subscriber of stock releases him from paying it because it is a breach of his contract, it must inevitably follow that, if, as in the case at bar, the subscriber has already paid for his stock, such consolidation against his will is equally a violation of his contract. Everybody knows that if several men enter into a valid contract, it cannot be fundamentally altered but by unanimous consent. Why should a different rule prevail as between corporators?

Upon the whole, I think that if the case made by the complainant does not fall within either the first or second of the propositions which I have above laid down, and does fall within the third, he is entitled to relief in equity.

It cannot be insisted that the proposed consolidation is within the first of these propositions. For, as already shown, the consolidation would not only fundamentally affect the Indianapolis and Cincinnati Railroad Company as a corporation, but it would destroy its very existence.

The defendants, however, argue, that the case at bar is within the second, and not the third, of these propositions, both because the charter of the Indianapolis and Cincinnati Railroad Company has been so amended as to meet the complainant's objection, and because he has consented to the consolidation. I will consider these points separately.

¹ Sparrow *vs.* The Evansville and Crawfordsville Railroad Company, 7 Indiana, 369; McCray *vs.* The Junction Railroad Company, 9 do., 858.

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First. As to the amendment of the charter of the Indianapolis and Cincinnati Railroad Company: The 35th section of that charter reserves to the legislature "the right at any time to alter or amend it, two-thirds of both branches concurring therein." Under this section there can be no doubt of the power of the legislature to amend the charter, even against the will of every stockholder. But it may be more doubtful whether under this reserved power, the legislature could consolidate this corporation with another against the will of the corporators. For that would be to destroy, not "to alter or amend," the charter. Be this as it may, however, if no amendment authorizing the consolidation in question has been made, it is obvious that the complainant's rights are the same as if the power to amend had not been reserved. But the defendants insist that an amendment altering the rights of the complainant has been made to the charter. The amendment to which they refer is the Indiana act of February 23, 1853,—a general law authorizing the consolidation of railroad companies.¹

The Indiana constitution of November, 1851, prohibits the legislature from passing special acts of incorporation, and authorizes the passage of general laws of incorporation. Under this provision, the general railroad act of 1852 was passed. It provided rules under which any company of men might become a railroad corporation. Its 37th section reserved to the legislature the right to amend or repeal the whole act. And the Supreme Court of Indiana, I think, justly regard as an amendment of it, the above-mentioned act of February 23, 1853,—the only act in this state authorizing the consolidation of railroad companies. We must then regard the last-named act as being substantially part and parcel of the general railroad law of Indiana. We must bear in mind, however, that the charter of the Indianapolis and Cin-

¹ 1 G. & H., 526.

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cinnati Railroad Company is a special act, passed before the constitution of 1851. And the question is, Does the general railroad law above referred to effect such an amendment of this special charter as is contemplated by its 35th section, which reserves the power to alter or amend the charter? I think it does not. We may well suppose that the only object of the reservation in the 35th section of this special charter was to retain in the legislature a power, which, without the reservation, could not be exercised,—a power to amend the charter authoritatively and without the consent of the railroad company. On the contrary, the consolidation act of 1853 is a mere privilege, allowing—not obliging—railroad companies to consolidate if they please to do so. Such a privilege the legislature doubtless could have offered, and perhaps did offer, by the act of 1853, to the Indianapolis and Cincinnati Railroad Company, just as well, and with exactly the same effect, without the said reservation in its charter, as with it. Besides, the privilege thus offered would be utterly inoperative as an amendment of the charter, till it was accepted by the company. Now the acceptance of this offered privilege would involve a fundamental change in the charter of the company accepting it,—a change which, if the doctrine already stated be true, could not be effected in the case of a corporation subsisting under a special charter, but by the consent of every stockholder. So far as appears, no such consent has ever been given by all the stockholders, or even by a majority of the stockholders, of the Indianapolis and Cincinnati Railroad Company. I conclude, therefore, that the general law of 1853, permitting railroad companies, at their pleasure, to consolidate, has never become part and parcel of the charter of the company in question, either by legislative amendment or otherwise.

Second. Has the complainant consented to the consolidation under consideration? And is he by such consent now estopped to insist on his objection to the consolidation?

It appears that he was one of the directors of this company

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on the 24th of May, 1866. On that day, the board of directors met to consider the subject of this proposed consolidation. He was present, and did not object. On the contrary, it appears by the minutes of the board, of that day, that the committees already mentioned then reported to the board the terms of consolidation agreed on by them; whereupon the board unanimously approved of the action of the committees reported, and the consolidation of the two companies upon the terms and conditions agreed to by the committees; and the board then and there recommended to the stockholders to consent to the consolidation, and they called a meeting of the stockholders to be held on a designated day in order that they might vote on the question of the consolidation. Immediately on the conclusion of these transactions of the board, the complainant resigned his office of a director. But the weight of the evidence before me strongly indicates that, so long as he remained a director, he made no objection to any of these proceedings, though he was present, might have objected if he pleased, and well knew what was going on. Under these circumstances, I think he ought to be considered as consenting to what was done. *Qui non prohibet quod prohibere potest, assentire videtur.*

But does this consent, given under these circumstances by the complainant, estop him to urge the present objection to the consolidation?

The proceedings of the board of directors as above detailed were merely prefatory and preparatory to the settlement of the question of consolidation. Certainly no decision of the board could effect the consolidation. To do that, required the decision of the stockholders. So the board understood it, else they would not have called a meeting of the stockholders to vote on the question. And the very articles of consolidation reported to, and approved by, the board at that time, recited that the consolidation was to be effected "by and with the assent of the stockholders." And as the board fixed a day for the taking of the vote of the stockholders, and as the

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board evidently meant to refer the settlement of the question to them, it must have been understood that if the stockholders voted against consolidation the whole thing would fail. It may fairly be presumed that all these directors were stockholders. Under all the circumstances, it seems very clear that all these directors holding stock would have the right to attend on the day appointed and vote for or against the consolidation. If any of them proposed then to vote against it, no man would have had a right to tell him, You must not vote so: you are estopped to do so, because you voted for the consolidation on the board. To such an objection, he might well answer, I voted then not as a stockholder, but as a director, guided by the best light I then had. Now I exercise my right as a stockholder. Besides, I have changed my opinion. I think now that the proposed consolidation would be injurious to my interests; and so I shall oppose it.

I cannot conceive how any vote of the complainant as one of the board of directors could destroy his right to vote as he pleased as a mere stockholder. Surely there remained to him and to all the directors the *locus poenitentiae*. After their action on the board they may have changed their minds. They had a right to do so up to the moment of the final voting by the stockholders, just as a bidder at an auction has a right to withdraw his bid before the property is knocked off to him. In all he did on this subject, there appears to have been nothing fraudulent, nothing deceitful, nothing injurious to any other stockholder. And there is nothing in his conduct throughout the whole transaction bearing the slightest resemblance either to a legal or equitable estoppel.

It has been urged on the part of the defendant, Henry C. Lord, that this court has no jurisdiction over his person; and that therefore we can make no order enjoining him. This objection is made on the ground that he is not a citizen of Indiana. The bill states that the complainant is a citizen of New York; that Lord is a citizen of Ohio; and that the Indianapolis and Cincinnati Railroad Company is an Indiana cor-

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poration. It appears that Lord was served with process in this case in this district. Under these circumstances, I should think that we could not take jurisdiction of the person of Mr. Lord by virtue alone of the eleventh section of the Judiciary Act of 1789.¹ But the act of February 28, 1839, must be considered in connection with the Judiciary Act.² A fair construction of both these acts, I think, gives us jurisdiction of the person of Mr. Lord in this case. I suppose that a citizen of New York may sue a citizen of Ohio in this court if he is served with process in the District of Indiana. This seems to be now the practice in the United States courts. Whether Mr. Lord is either a necessary or a proper party to this suit, is another question,—a question not necessary to be decided on the present motion.

In view, then, of the whole case, I am reluctantly led to the conclusion that the complainant's motion for a temporary injunction ought to be granted.

Therefore, it is ordered, adjudged, and decreed, that upon the complainant filing an injunction bond in the penalty of one hundred thousand dollars, with the usual condition and sufficient sureties to be approved by the court, the said Indianapolis and Cincinnati Railroad Company, its Board of Directors, officers, and agents, be enjoined, till the further order of this court, from proceeding any further to consummate the said proposed consolidation, or to issue any of the bonds mentioned in the complainant's bill, or to apply any of such bonds or any of the funds or property of said company to the purchase of stock in the Cincinnati, Indianapolis and Danville Railroad Company.

In a case recently, July, 1874, heard at Madison, Wisconsin, before Judges Davis, Drummond and Hopkins, *W. F. Piek, et al vs. Chicago and Northwestern R. R. Co.*, to be reported in subsequent volume of this Series, it was

¹ 1 U. S. Statutes at Large, 78.

² 5 U. S. Statutes at Large, 32.

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held that a provision of the Constitution of the state, that railroad charters "may be altered or repealed by the Legislature at any time after their passage," underlies all subsequent grants of rights and franchises to the railroad corporations of the state; that stock and securities in such corporations were taken and held subject to this paramount condition, of which, in law, all holders had notice; and that such corporations could not clothe their creditors with greater rights, as against the state, than it possessed itself; and that this principle was not changed by authority from the legislature to consolidate with other railroads.

The mere presence of a person at a lawful meeting does not make him responsible for a resolution there passed, if he protests against it; and where a director opposed a resolution, but, finding himself in a minority, insisted on the insertion of certain terms, believing that such insertion would prevent the plan of the majority from being carried out, *held*, that he was not responsible on the plan being carried out on those terms. *In re Direct, &c., Railway Co.*, 31 English Law and Equity, 430.

The act of February 28, 1839, was passed to remedy the inconvenience under the settled construction of the Judiciary Act of 1789, by which, when there was more than one party, plaintiff or defendant, the court must have jurisdiction between each party, plaintiff and defendant, or the action could not be maintained. *Taylor vs. Cook*, 2 McLean, 516. This act of 1839, however, wrought no change in the jurisdiction of the circuit courts, as respects the character of the parties; it only obviates difficulties arising from inability to join or serve those not liable to be sued by the plaintiff, or not within reach of process. *Commercial Bank of Vicksburg vs. Slocomb*, 14 Peters, 60.

"This act relates solely to the non-joinder of persons who are not within the reach of the process of the court. It does not affect any case where persons having an interest are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and, so far as it touches suits in equity, we understand it to be no more than a legislative affirmation of the rule previously established by the cases of *Cameron vs. McRoberts*, 8 Wheaton, 591; *Osborn vs. The Bank of the United States*, 9 *Ibid.*, 738, and *Harding vs. Handy*, 11 *Ibid.*, 132"; *Sheilds vs. Barrow*, 17 Howard, 141.

If the absent defendant be a resident of the same state with the plaintiff, the jurisdiction cannot be sustained, as the suit would not be, as between them, a suit between citizens of different states. *Bargh et al. vs. Page et al.* 4 McLean, 11.

Several of the above cases are commented upon in *Louisville R. R. Co. vs. Letson*, 2 Howard, 497, in which case the court say, p. 557, "We think, as was said in the case of *The Commercial Bank of Vicksburg vs. Slocomb*, that this act was intended to remove the difficulties which occurred in practice, in cases both in law and equity, under that clause in the 11th section of the Judiciary Act, which declares that no civil suit shall be brought before either of said courts against an inhabitant of the United

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States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ; but a re-examination of the entire section will not permit us to re-affirm what was said in that case,—that the act did not contemplate a change in the jurisdiction of the courts as it regards the character of the parties.”

Consult also *Heriot vs. Davis*, 2 Woodbury & Minot, 229; *Clearwater vs. Meredith*, 21 Howard, 489.—[Reporter.]

THE UNITED STATES vs. CATHARINE MORIN.

DISTRICT COURT.—DISTRICT OF INDIANA.—JUNE, 1866.

VIOLATION OF REVENUE LAW—FORM OF PROSECUTION.

1. No action of debt will lie on the 73d section of the Internal Revenue law of June 30, 1864. The prosecution must be by indictment.

2. When a statute renders an offense punishable by imprisonment, or fine, or both, the district attorney cannot waive the imprisonment, and sue in debt for the fine.

3. *Quære*, whether debt will lie on a penal statute which does not fix the amount of the penalty.

John Hanna, U. S. District Attorney, for the United States.

Fabius M. Finch, for defendant.

MCDONALD, J.—This is an action of debt to recover a penalty of five hundred dollars against the defendant, for carrying on the business of a retail dealer in cigars without a license. A demurrer has been filed to the declaration; and whether the demurrer ought to be sustained, is the point to be decided.

The only question raised in support of the demurrer is this: Does an action of debt lie, under the United States Revenue Laws, for a failure to take out a license in a case in which by those laws a license is required?

This action is founded on the 73d section of the act of June 30, 1864.¹

That section is as follows:

"That if any person or persons shall exercise or carry on any trade, business, or profession, or do any act hereinafter mentioned, for the exercising, carrying on, or doing of which trade, business, or profession, a license is required by this act, without taking out such license as in that behalf required, he, she, or they shall, for every such offense, besides being liable for the payment of the tax, be subject to imprisonment for a term not exceeding two years, or a fine not exceeding five hundred dollars, or both, one moiety of such fine to the use of the United States, the other moiety to the use of the person who shall first give information of the fact whereby said forfeiture was incurred."

I do not understand the district attorney as insisting that on the words of this section alone, an action of debt would lie for an omission to take out a license. But he argues that, considered in connection with the 41st and 179th sections of the act, such action is authorized.

The 41st section provides that "all fines, penalties, and forfeitures, which may be imposed or incurred by virtue of this act, shall be sued for and recovered in the name of the United States in any proper form of action, or by any appropriate form of proceeding, *qui tam*, or otherwise."

And the 179th section declares that "all fines, penalties, and forfeitures, which may be incurred or imposed by virtue of this act, shall and may be sued for and recovered, where not otherwise herein provided, in the name of the United

¹ 18 U. S. Statutes at large, 223.

States, in any proper form of action, or by any appropriate form of proceeding."

The provisions of these two sections seems to be substantially the same. None of the sections referred to designate, in terms, the form of prosecution to be pursued. But both the 41st and 179th sections indicate two distinct modes of proceeding, namely: "by any action," or "by an appropriate form of proceeding." The word "action" probably here refers to those civil actions known to the common law by the names of debt, assumpsit, &c. The "appropriate form of proceeding" mentioned in these sections may include, not only civil actions at common law, but also indictments and criminal prosecutions. For the phrase is certainly more comprehensive, than the term "action." Considering the whole scope of these two sections, I think they simply mean that whosoever violates the Internal Revenue Law, and thereby incurs a liability to any punishment, the mode of prosecuting which is not distinctly named in the law, shall be proceeded against in such manner as by the common law is the appropriate remedy.

Now, the prescribed punishment in the present case is "imprisonment for a term not exceeding two years, or a fine not exceeding five hundred dollars, or both." The appropriate proceeding in such a case does not appear to me to be the common law action of debt. In this view, I think I am sustained by the following considerations:

1. An action of debt is not the "appropriate proceeding" to enforce the prescribed punishment of imprisonment.

Imprisonment is as much the prescribed punishment for the offense in question as a fine is. And if it be said that debt might lie for the fine, it may be answered, that debt will not lie for the imprisonment.

The district attorney, however, insists that he has the right, on the part of the Government, to waive the imprisonment, and to proceed for the fine only. But I think he has not that right. I think it is for the court alone to determine whether

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the delinquent should be imprisoned only, or fined only, or both fined and imprisoned. No one could well determine what sort of punishment ought to be inflicted, till the evidence is heard on the trial. Besides, such a determination involves the exercise of judicial authority; and I am not aware that judicial power is vested in the district attorney.

2. In my opinion, the action of debt is not the "appropriate" remedy for enforcing a "fine," even if the district attorney might waive the imprisonment.

The word "fine," as employed in the 73rd section of the Internal Revenue Act, *ex vi termini* implies a criminal prosecution. This term, I admit, is used in some parts of that act in a vague sense, as meaning, perhaps, a forfeiture, or penalty, or punishment. But, in the 73rd section, on which this action is founded, it is employed in connection with the term "imprisonment;" and when used in that connection, it always supposes a criminal prosecution. Here the rule, *nos-citur a sociis* applies. The common punishment for all misdemeanors is fine and imprisonment; and nobody ever thought of bringing an action of debt in such a case to recover the fine. Moreover, the proper process at common law to collect a fine is a *capias pro fine*, and not a *feri facias*, which is the proper process on a judgment in debt.

3. I much question whether, if in this case a civil action would lie, that action would be debt.

I do not, indeed, think that any form of civil action will lie in this case. It seems to me that the only appropriate proceeding is by indictment. Perhaps a criminal information might, according to the English practice, be adopted. But, at any rate, I think the action of debt is inappropriate.

It is true that, at common law, debt is a very comprehensive remedy. It lies on judgments, recognizances, bonds, simple contracts, and penal statutes. But it lies only for a certain sum of money. Within this rule it is, indeed, a maxim that *certum est, quod certum reddi potest*. But in no case will debt lie where the sum claimed can not conveniently

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and readily be reduced to legal certainty. When a statute creates a penalty in a fixed sum—as in offenses under the stamp law—no doubt debt may be maintained for that sum. Thus, says Chitty, it lies on a statute “whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty.”¹

But how is it in the case at bar? The district attorney in his declaration asks “that the said defendant render unto the plaintiff the just and full sum of five hundred dollars lawful money of the United States, which the said defendant owes to and unjustly detains from the plaintiff,” because the defendant had been retailing cigars without a license, contrary to the Internal Revenue Act. Now, is that the truth? Even if the defendant has thus violated the law, does she owe to the United States five hundred dollars for the violation? What court can say, *a priori*, that she does? Is there as yet, even allowing the fact that she has violated the law, any certainty that she owes the United States anything on that account? Even if found guilty, the court might make the punishment imprisonment alone. Is this, then, suing for “a sum certain”? The statute fixes no certain sum. It only says that the offender may be subject to “a fine not exceeding five hundred dollars.” It may be one dollar, or one hundred dollars, as well as five hundred. And the district attorney might as well have claimed in his declaration five dollars or fifty dollars to be “the sum certain,” as five hundred dollars. In fine, he might just as well have fixed on any sum under five hundred dollars as on that sum, so far as making a good declaration in debt is concerned.

It is clear that the fine contemplated by the 73rd section of the Internal Revenue Act must be wholly uncertain in amount. It is in this respect more uncertain than ordinary claims for unliquidated damages, which every lawyer knows

¹ 1 Chitty on Pleading, 106.

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cannot be the subjects of actions of debt. For in all actions of assumpsit, trespass, and case, if the charge is sustained by sufficient evidence, it is certain that some amount must be recovered; but, in proper proceedings in a case like the present, though every material fact were proved or confessed, the sum to be assessed against the defendant would not only be as uncertain as in an action of assumpsit, trespass, or on the case, but, up to the moment of the decision, it would remain uncertain whether any amount at all would be assessed; for the court might punish the offense by imprisonment alone.

I know that there is some authority for holding that debt will lie on a penal statute which does not fix the amount of the penalty. My opinion is that, upon the principles of the common law, it will not. But be that as it may, I think it is very clear that no action of debt can be maintained on the 73rd section of the Internal Revenue Act of June 30, 1864.

The demurrer is sustained, and the suit dismissed.

Consult *United States vs. Ebner*, *post* p.117.—[Reporter.]

United States vs. Thomasson.

THE UNITED STATES vs JOHN D. THOMASSON
AND WILLIAM P. STULTS.

DISTRICT COURT.—DISTRICT OF INDIANA.—JULY, 1866.

1. VIOLATION OF REVENUE LAW BY PARTNER.—Every partner is civilly liable for violations of the revenue law by his co-partners, whether he knew of, or consented to, such violations, or not.

2. The 91st section of the Internal Revenue Act of March 3, 1865, must be so construed as to create a penalty of three hundred dollars for every violation of it.

3. Penal Statutes not authorizing indictments are not within the rule of criminal law, that a man is not punishable unless he has been guilty both of a criminal act or omission and a criminal or unlawful intent.

John Hanna, U. S. District Attorney, *A. G. Porter*, and *M. M. Ray*, for the United States.

McDonald, Rouch & Sheeks, for defendants.

MCDONALD, J.—This is an action of debt on the 91st section of the Internal Revenue Act of March 3, 1865.¹

The declaration charges, that the defendants were manufacturers of tobacco, at Bedford, Indiana; and that, with intent to evade the revenue duties, they fraudulently marked one hundred and twenty boxes of their manufactured tobacco with the proper inspector's marks, the same never having been either inspected or marked by said inspector.

The defendant pleaded the general issue; and by agreement a jury was waived, and the cause was tried by the court. At the request of counsel, the court found specially. This special finding was as follows:

"That during the whole of the year 1865, the defendants and one Joseph Gravely (who was sued in this action, but

¹ 13 U. S. Statutes at Large, 475.

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not served with process) were partners in the business of buying, manufacturing, and selling tobacco in the town of Bedford, Indiana; that, during that year, and before the commencement of this action, they manufactured and put up in boxes, in said town, more than five thousand pounds of tobacco in more than three hundred of said boxes; that, in that town, in the month of October, 1865, they fraudulently marked, in the likeness and imitation of the proper inspector's mark, fifty of said boxes of manufactured tobacco, then their joint property as such partners as aforesaid, with the intent to evade the duties thereon, in violation of the act of Congress in such case made and provided; that said fifty boxes of tobacco were never inspected or marked by any proper United States inspector of tobacco; that said defendants then and there, as such partners as aforesaid, in the usual course of their trade and business, sold several of said boxes of tobacco, thus fraudulently marked as aforesaid; that said John D. Thomasson, however, had no actual knowledge of, and gave no actual consent to, the said fraudulent marking of said boxes of tobacco and the sale thereof till this suit was commenced; but that, under the circumstances in evidence on the trial, it was his duty, at his peril, to see that no such fraudulent marks were made on any of said boxes of tobacco. Therefore, the court finds the issue joined for the United States, both as against the said Thomasson and the said Stults, and assesses the plaintiff's debt at the sum of fifteen thousand dollars."

On the announcement of this finding, the defendants jointly moved for judgment thereon in their favor. At the same time, Thomasson separately moved for a judgment on the finding in his favor. And along with these motions, the defendants also moved in arrest of judgment.

Counsel agree that all these motions shall be considered and decided together. We therefore proceed to their consideration in the order above stated.

1. The joint motion for judgment on the finding in favor of the defendants, I think is entitled to very little considera-

tion. There can be no doubt that the finding is sufficient to justify a judgment against Stults. And, as under the practice of this court, though perhaps contrary to the common law, this case might be dismissed as to Thomasson, and a separate judgment rendered against Stults, it is clear that this motion must be overruled.

2. The separate motion for a judgment on the finding in favor of Thomasson deserves more attention.

It appears by this finding that Thomasson had no actual knowledge of the fraud charged, and gave no actual consent to it. And this circumstance involves the question, whether, as a partner, he is chargeable for the fraud of his co-partner touching a transaction of which he knew nothing and to which he never consented. In other words, as a partner, was he bound in law, at his peril, to prevent the fraud, or to suffer the penalty?

Without doubt, it is a general rule, that every partner is civilly responsible for the fraud of his co-partner perpetrated in relation to the partnership business.

On the other hand, it is certainly a general rule that, in criminal law, no man is punishable unless he has been guilty both of a criminal act or omission and a criminal or unlawful intent. Without the latter there can in general be no crime. And it may be plausibly argued that the reason of this rule applies to all penal statutes. So far, however, as I can learn, penal statutes not authorizing indictments have never been considered as within the rule. The same reason which would apply the rule to such statutes, would also apply it to civil actions for libels. For every libel is a *malicious* defamation; and malice always supposes a wicked intent. Yet, in an action for a libel, published in a newspaper, against the proprietor, it has been held that he was liable, though it was published against his orders and without his knowledge, in his absence.¹

Duen *vs.* Hall, 1 Indiana, 344.

And in England it is held that the proprietor of a newspaper is answerable for the act of his agent or co-partner, not only civilly, but criminally, though there was no proof of personal knowledge of it on the part of the proprietor.¹

The reason of the doctrine in all such cases must proceed on the ground that it is the duty of the proprietor of every newspaper, at his peril, to see that his publications contain nothing libelous; and that every omission of that duty is culpable negligence, equivalent to a malicious or unlawful intent.

"The same principles," says Collyer, "apply to breaches of the revenue laws."² And certainly, by the same reasoning, it would seem that when partners engage in the manufacture and sale of tobacco, which, by the revenue law, must be inspected and marked by a United States inspector, every one of them must, at his peril, take care that the revenue be not defrauded by any forged inspection marks on the boxes of tobacco manufactured and sold by the firm.

As well in the case of libels as in the case of revenue frauds, the act of an agent is the act of his principal. And, in such cases, the principal is liable under the rule, that *qui facit per alium, facit per se*. Now, every partner is an agent for all his co-partners. His acts bind the firm, and are, in legal contemplation, the acts of the firm.³

There are two decisions of the Supreme Court of Indiana apparently opposed to the foregoing reasoning.⁴

These cases decide that when the agent of the owner of a drinking house, without his knowledge or consent, unlawfully retailed spirits, the owner was not indictable for it. The rea-

¹ *Rex vs. Walter*, 3 Espinasse, 21.

² Collyer's Law of Partnership, 306; *Attorney-General vs. Stannyforth*, Bunbury, 97.

³ *Cliquot's Champagne*, 3 Wallace, 114.

⁴ *Hipp vs. The State*, 5 Blackford, 149; *Lauer vs. The State*, 24 Indiana, 181.

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son on which these decisions are founded is not very satisfactory. I should hesitate to follow it. I think it would be more reasonable to hold that he who keeps a dram-shop is bound, at his peril, to take care that his agents, in carrying on the business, do not violate the law. But at most, these cases are not quite in point. They were cases of indictment under a criminal statute; this is an action of debt on a penal statute.

The true and just rule, in cases like the present, seems to me to be this: that any violation of the internal revenue laws incurring a penalty committed by a partner in the course of partnership business, is, in legal contemplation, the act of all the partners; and that, therefore, each one of them is liable to pay the penalty. This is the view that Judge Story took of the matter. He says that "if breaches of the revenue laws, by fraudulent importations, or smuggling, or entries at the custom house, are committed by one of the firm in the course of the business thereof, all the firm would be liable penally, as well as civilly, therefor."¹

The English authorities abundantly sustain the same view.

Consequently, no separate judgment of acquittal can be rendered in favor of Thomasson.

3. The defendants move in arrest of judgment.

This motion proceeds on the supposition that the Internal Revenue Act, fairly construed, does not make it penal to forge inspectors' marks on boxes of manufactured tobacco.

The 91st section of the act provides that "the penalties for the fraudulent marking of any box or other package of tobacco, snuff, or cigars, by changing in any manner the packages or the marks thereon, shall be the same as are provided in relation to distilled spirits by existing laws." This provision plainly refers us to another provision of the revenue laws, which declares that "any person who shall attempt fraudu-

¹ Story on Partnership, §166.

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lently to evade the payment of duties upon any spirits distilled as aforesaid, by changing in any manner the mark on any cask or package, shall forfeit the sum of three hundred dollars for each cask or package so altered or changed." It is plausibly argued in the defense, that, since the last-cited provision does not provide a penalty for a complete forgery of inspection marks, but only for "changing" genuine ones, the case at bar is not within the act. And, indeed, it seems plain enough that under the last-cited provision of the act, a prosecution could only be sustained for "changing" genuine marks, and not for an outright forgery of inspection marks on packages which had no genuine inspection marks on them. But the 91st section, on which this prosecution is founded, does render penal "the fraudulent marking of any box or package of tobacco," and not merely the "changing" of genuine marks; and the only question is, What penalty, taking these two provisions together, is intended? The 91st section, which creates and defines the offense, does not refer us to any other part of the act for a definition. That were supererogatory. We are, therefore, only referred to another part of the act for the penalty. The definitions in the part of the act last above cited are consequently wholly unimportant to the point in question. Upon the whole, therefore, I do not doubt that, construing these two parts of the act together, the meaning plainly is this, that whoever shall be guilty of fraudulently marking any box of tobacco in violation of the internal revenue laws, shall forfeit the sum of three hundred dollars for every box so fraudulently marked.

The motion in arrest is overruled, and final judgment is rendered for fifteen thousand dollars.

The members of a firm may be jointly indicted for making a fraudulent monthly return of tobacco manufactured, though only sworn to by one of them. *United States vs. Mountjoy*, 8 Internal Revenue Rec., 88, 159.—[Reporter.]

THE UNITED STATES *vs.* JOHN B. TROUT.

DISTRICT COURT.—DISTRICT OF INDIANA.—JUNE, 1867.

1. **INDICTMENT.**—When an offense is prohibited by several statutes, it is usual to conclude the indictment *contra formam statutorum*. But a conclusion *contra formam statuti* in such a case will not be sufficient to support a motion in arrest of judgment. So, a conclusion in the plural where there is but one prohibitory statute, is not ground for motion in arrest of judgment.

2. **FORGING TREASURY NOTES.**—An indictment for forging treasury notes need not in terms give them that name. The court will determine what they are by the copies of them set out in the indictment.

3. In an indictment for forging a treasury note, it is not necessary to aver that it was made in the resemblance of the genuine notes.

Hanna & Knefler, for the motion.

Alfred Kilgore, U. S. District Attorney, *contra*.

MCDONALD J.—At the present term, the defendant, Trout, was indicted for having in his possession three counterfeit United States treasury notes, of the denomination of fifty dollars, with intent to pass them.

On a plea of not guilty, the jury found him as charged in the indictment.

His counsel now move in arrest of judgment on this verdict.

There are three counts in the indictment on three several counterfeit treasury notes.

First, it is contended that the judgment ought to be arrested, because the conclusion of each of the counts is bad.

The first and second counts conclude "contrary to the form of the acts of Congress in such case made and provided." The conclusion of the third is the same, except that *act*, instead of "acts" is employed.

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It is urged that there is but one act of Congress on the subject of this indictment; and that therefore the conclusion, "contrary to the *acts*," in the first and second counts, is bad.

"The rule given in the old writers is, that where an offense is prohibited by several independent statutes, it was necessary to conclude in the plural; but now the better opinion seems to be that a conclusion in the singular will suffice."¹

The old doctrine has been followed in Indiana.²

But I think the weight of authority is against these Indiana decisions. And if even I am wrong in this view, it would not follow that an indictment on a single statute concluding in the plural is bad. Indeed, the Supreme Court of Indiana has held that an indictment on a single statute concluding in the plural is good.³

But be all this as it may, it is certain that if there be one good count in this indictment, the judgment cannot be arrested. Here the first and second counts conclude in the plural, and the third in the singular; and there is a general verdict of guilty on all. Under these circumstances, it is impossible to arrest the judgment on the ground that the counts conclude wrong; for one of them at least must conclude right.

Secondly, in support of the motion in arrest, it is urged that, as the indictment is framed on the 10th section of the act of June 30, 1864, which provides for the punishment of persons who "shall have or keep in possession or conceal any false, forged, counterfeited, or altered obligation or other security" of the United States, with intent to pass the same the indictment ought to have alleged in terms that the forged notes in question are such "obligations or securities." The 13th section of the act declares that "the words 'obligation

¹ Wharton's American Criminal Law, §412.

² The State vs. Moses, 7 Blackford, 244; The State vs. Hunter, 8 do., 212. Francisco vs. The State, 1 Indiana, 179.

³ Carter vs. The State, 2 Indiana, 617.

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or other security of the United States' used in this act shall be held to include and mean all bonds, coupons, national currency, United States notes, treasury notes," &c.¹

The 10th section of this act, therefore, undoubtedly reaches the forged notes in question. These, as copied in the indictment, on their face purport to be United States treasury notes,—"securities for the United States." There is, therefore, no use in alleging in the indictment the name of these instruments. No name need be given them. Yet, in fact, the indictment does describe them as "false, forged, and counterfeit treasury notes"; and it copies them. This surely is enough, without adding, in the language of the 10th section of the act, that they were "obligations or other securities of the United States."

Thirdly, it is insisted in support of this motion, that the indictment ought to have averred that these counterfeit treasury notes were made in the resemblance of the genuine ones.

In describing counterfeit coin, it is usual to aver that it is made in the likeness and resemblance of the genuine. And, in that case, such an averment may be necessary; though there are some English precedents to the contrary.²

But in charging a forgery of paper money, I have found no precedent containing the averment in question. On the contrary, there are many precedents not containing it.³

This view of the question has been sustained by the Supreme Court of Illinois.⁴

The motion in arrest is overruled.

A conclusion "against the form of the statute" is sufficient when the offense is within more than one independent statute, and a conclusion

¹ 13 U. S. Statutes at Large, 222.

² Archibald's Criminal Practice and Pleadings, 571.

³ Archibald's Criminal Practice and Pleading, 289; Wharton's Precedents, 813.

⁴ Swain *vs.* The People, 4 Scam., 178.

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"against the form of the statutes, would be good though the offense were punishable by a single statute only. *United States vs. Gilbert*, 2 Sumner, 21. This decision was given on a motion for new trial and in arrest of judgment.

In the case of *United States vs. Burns*, 5 McLean, 23, an indictment for counterfeiting coin,—and where there was an averment of its "likeness and similitude of genuine coin,"—the court held that such averment must be proved, and laid down the rule that "if, from incompleteness or the clumsiness of the manufacture, men of very ordinary circumspection and intelligence could not be imposed upon by them [the coins] there is no ground for the inference that they were designed for fraudulent use."

See also *United States vs. Morrow*, 4 Washington C. C., 733 —[*Reporter*

WILLIAM F. REYNOLDS vs. JOHN S. WILLIAMS.

CIRCUIT COURT.—DISTRICT OF INDIANA.—SEPTEMBER, 1867.

INTERNAL REVENUE—GAINS—PROFITS—INCOME.

In 1863, the Lafayette and Indianapolis R. R. Co. accumulated a fund of \$100,000 in U. S. bonds as net earnings. In 1867, by consolidation with another road, it ceased to exist. By the articles of consolidation, this fund was transferred to the plaintiff, as a trustee for the use of the stockholders in the first-named company. An assessor of internal revenue assessed on this fund in the hands of the trustee, \$5,000 of taxes, as being gains, profits, and income accrued to the beneficiaries in the year in which the trustee received the fund. To make this tax, the collector of internal revenue, the defendant, threatened to distrain the trustee's property. To avoid such distress, the latter, under protest, paid the \$5,000.

Held, that said \$100,000 was not, under the circumstances, liable to the tax of \$5,000; and that the tax so paid might be recovered.

McDonald, Roach & McDonald, for plaintiff.

Hendricks, Hord & Hendricks, for defendant.

MCDONALD, J.—This is an action of assumpsit. The declaration consists of a simple special count. A demurrer is filed to it; and whether the demurrer ought to be sustained is the question to be decided.

The declaration avers, that on the 8th of January, 1867, the Lafayette and Indianapolis Railroad Company and the Indianapolis and Cincinnati Railroad Company—both Indiana corporations—were duly consolidated under the laws of this state, so as to merge the two in one new corporation called The Indianapolis, Cincinnati, and Lafayette Railroad Company; that, by the articles of said consolidation, the plaintiff was appointed trustee of the Lafayette and Indianapolis Railroad Company, charged with the duty of adjusting its unsettled business; that he accepted the trust; that in July, 1868, the plaintiff, in pursuance of instructions from the commissioner of internal revenue, issued to the assessor for the Eighth District of Indiana, reported to said assessor the condition of the receipts and expenditures of the Lafayette and Indianapolis Railroad Company from the 1st of July, 1864, to the 30th of June, 1866, the date at which the last-named company ceased to operate its road; that by said report it appeared that the net earnings of said company during that period were one hundred and eight-eight thousand six hundred and sixty-two dollars and forty-five cents; that the plaintiff, in pursuance of like instructions, reported to said assessor the amount of funds of said company, by which it appears that on the 2nd of July, 1863, said company had invested in United States bonds one hundred thousand dollars, which the plaintiff, when he made said report, held in his hands as such trustee as aforesaid, and which were previous net proceeds of the company; that thereupon the assessor assessed against the plaintiff, as such trustee as aforesaid, internal revenue tax, not only on said one hundred and eighty-eight thousand six hundred and sixty-two dollars and

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forty-five cents, but also on said one hundred thousand dollars; that on said one hundred thousand dollars the tax, so assessed for the year 1867 was five thousand dollars; and that from this last-named assessment the plaintiff appealed to the commissioner of internal revenue, who, in September, 1868, overruled the plaintiff's objection to said assessment.

The declaration further alleges that the defendant, John S. Williams, who was then the collector for said Eighth District, being ordered to collect said five thousand dollars of tax, threatened to make the same by distress and sale; that to avoid such distress and sale, the plaintiff, under this coercion and under protest, paid said five thousand dollars to the defendant; and that the assessment of said tax was utterly illegal.

The declaration makes no complaint about the tax assessed on one hundred and eighty-eight thousand six hundred and sixty-two dollars and forty-five cents, and which appears to have been paid.

From the declaration, it is fairly deducible that said sum of one hundred thousand dollars is no part of said one hundred and eighty-eight thousand six hundred and sixty-two dollars and forty-five cents, but was held by the company long before the latter sum was accumulated.

It appears, then, that the one hundred thousand dollars of United States bonds was the property of the Lafayette and Indianapolis Railroad Company in the year 1863, and continued to belong to that company till its dissolution on the 8th day of January, 1867; and that on that day the plaintiff, as trustee, became, and ever since has been, the legal owner of the bonds in question. For whom he holds them in trust, is not clearly stated in the declaration. But, in the absence of positive statement, it must be presumed that this trust fund is held for the use of the stockholders in the now extinct Lafayette and Indianapolis Railroad Company. And the question is, Ought this fund, thus held by the plaintiff in trust for men who were once corporators in said company, to have been thus taxed?

If the declaration does not affirmatively show with reasonable certainty that this taxation was illegal, we must sustain the demurrer. For if that is not shown, the presumption is in favor of the legality of the assessment.

The act in force when this assessment was made, declared "That there shall be levied, collected, and paid, annually, upon the gains, profits, and income of every person * * * whether derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment or vocation * * * or from any other source whatever," a tax, &c.¹

And the same act provides for the assessment on trustees of such "gains, profits, and income" in their hands for the use of beneficiaries. And the act makes such trustees liable to pay the revenue on such gains, profits, and income in like manner as the beneficiaries would be if the same were in their hands.

The only question, therefore, seems to be this: Was said sum of one hundred thousand dollars of U. S. bonds either gains, profits, or income acquired within the year 1867, in the sense in which these terms are used in the act above cited? If so, the taxation was right; otherwise, it was wrong.

From what appears in the declaration, it is certain that the plaintiff as a trustee, became the owner of these bonds on the 8th day of January, 1867. Before that time they were the property of the Lafayette and Indianapolis Railroad Company. On that day this company died, and by a sort of last will and testament, called in the declaration "articles of consolidation," transferred the legal title to said bonds to the plaintiff as a trustee, and the equitable interest in them, as I construe the declaration, to the stockholders of said company. These bonds, so far as appears from the declaration, never were taxed in the hands of the company.

¹ 14 U. S. Statutes at Large, 478.

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I suppose that the "gains, profits, and income," mentioned in the act to which we have referred, are not to be regarded as an increase of the wealth of the trustees, but of the *cestui que trusts* for whom he receives and holds these gains, profits and income. I suppose, too, that the mere change from the hands of one trustee into those of another, of the fund which is the subject of the trust, would not make the whole fund in the hands of the last trustee—gains, profits, and income—within the meaning of the revenue law. If this be so, then the inquiry must be, whether the one hundred thousand dollars of bonds, which in 1867 came to the hands of the plaintiff as trustee, was so much added to the wealth of the beneficiaries as a new acquisition; or whether it was not a mere change of an interest that had accrued before the year 1867 from the hands of one trustee into those of another. When the bonds came to the possession of the plaintiff as trustee, he thereby became the legal owner of them; before that time, the Lafayette and Indianapolis Railroad Company was the legal owner of them. The beneficiaries never had more than an equitable title to them. An equitable title to them they undoubtedly have had ever since these bonds came into the possession of the plaintiff as trustee. But had the beneficiaries such an equitable title to the bonds while they remained in the possession of the railroad company? The answer to this question must decide the present action.

A railroad corporation is a mere ideal thing; and yet, in legal consideration, it is the owner of all the property which it controls,—the road, the rolling stock, the capital stock, the accumulated funds. But, in my opinion, it, being a merely artificial person, is only the legal owner of the property in trust for all the natural persons who are interested in it, including all stockholders, and all creditors.

Now, it appears by the declaration that the bonds in question had been acquired by the railroad company as early as 1863. This accumulated fund remained on hand till the

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company ceased to be. For whose use did the company hold this fund? Not for the use of its creditors; for it does not appear to have owed any debts. So far as appears, the stockholders were the only natural persons in the world who had any interest in this fund; and it inevitably follows that this artificial person, the railroad company, held it in trust for its stockholders. Hence, it is clear that, though the corporation was the legal owner of the bonds, yet the stockholders were the equitable owners of them; or—to say the least—had an equitable interest in them. I must conclude, therefore, that the beneficiaries for whom the plaintiff held these bonds in 1867 had some interest in them before that year; and that consequently the bonds were not wholly an acquisition of “gains, profits, and income” accruing to them in that year. But I go further: I think that the interest which the stockholders held in these bonds while the railway company was the legal owner of them, is precisely the same interest which they held in them when in the hands of the plaintiff as trustee. In neither case did they hold a legal title to them; and in both cases they held an equitable title to them, or at least an equitable interest in them.

It follows that the mere passage of this trust fund from the possession of the old trustee, the corporation, into that of the new trustee, the plaintiff, was not “gains, profits, or income,” accruing to the stockholders by that operation.

Counsel for the defendant have called my attention to the case of *Van Allen vs. The Assessors, &c.*, 3 Wallace, 573, as supporting their view of the case. But I do not perceive that it is at all in point.

The demurrer is overruled.

Emigh vs. Pittsburgh, Fort Wayne and Chicago R. R. Co.

ASHEL EMIGH vs. THE PITTSBURGH, FT. WAYNE
AND CHICAGO RAILROAD COMPANY.

CIRCUIT COURT.—DISTRICT OF INDIANA.—NOVEMBER
TERM, 1867.

1. ACTION ON THE CASE—WHEN IT LIES.—There are two cases of injuries on which the action on the case lies,—*first*, when there has been no contract, and a tort is unaccompanied by force, and is followed by a consequential injury ; *second*, where a contract, express or implied, exists out of which a common law duty arises, and the party on whom that duty devolves is guilty of malfeasance, misfeasance, or non-feasance in regard to it.

2. EJECTION FROM RAILROAD TRAIN.—When a railroad company engages to carry a passenger, and, after taking him on the train, wrongfully puts him off, the action of trespass on the case will lie.

Ketchum & Mitchell, for plaintiff.

Hendricks, Hord & Hendricks, for defendant.

MCDONALD, J.—This is an action on the case for wrongfully putting the plaintiff off a train of the defendant's passenger cars.

There are two counts in the declaration, and a demurrer to the whole declaration is filed, for the cause that there is a misjoinder of counts.

The first count is undoubtedly in case. But the defendant insists that the second count is in assumpsit and not in case.

The charge in the second count is substantially as follows : that the defendant was a common carrier of persons from Pittsburgh through Indiana to Chicago ; that for a valuable consideration paid to the defendant, the defendant agreed with the plaintiff to carry him over said road from 1866 till 1870, giving him annual passes so to be carried ; that in March, 1867, the defendant received the plaintiff on the defendant's cars at Pittsburgh to be carried on said road to Fort Wayne, in pur-

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suance of said agreement, and carried plaintiff to a point within five and one-half miles of Fort Wayne, when the defendant (having before refused the plaintiff said annual pass) by an agent of the defendant, and then the conductor on the train, refused to carry the plaintiff any further, unless he would pay fare for his passage ; that the plaintiff insisting on his right under said agreement, the conductor stopped the train in the open country far from any depot, and there, by threats of violence, obliged the plaintiff to quit the train, and left him with his baggage, where he had no means of conveyance to the place whither he was bound, at the dawn of day and exposed to the cold ; and that by reason of the premises he suffered, &c., and was delayed in his business, &c., and sustained damages to the amount of \$5,000.

The defendant insists that this count is in assumpsit, because it is founded on a contract. It does, indeed, by way of inducement, set out a contract. But, if that circumstance necessarily destroys its character as a count in case, then the first count is in the same predicament, for it also sets forth a contract, and a contract, too, very similar to the one in the second count.

As I understand it, the subjects proper for action on the case are of two distinct classes. First, where there is a tort committed, without force, on the person, character, or property of the plaintiff, entirely unconnected with any contract. Secondly, when there is a contract, either express or implied, from which a common law duty results, an action on the case lies for a breach of that duty ; in which case the contract is laid as mere inducement, and the tort arising from the breach of duty as the *gravamen* of the action. Thus if a lawyer or a physician is engaged by special contract to render professional services, and if, in the performance of such services he is guilty of gross ignorance or negligence, an action on the case will lie against him, notwithstanding such special contract. So this form of action lies against agents, wharfingers, and common carriers, whether they be acting under a contract express or implied. Indeed, nothing is more common in the common law

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courts than the action on the case against common carriers of goods, though their engagements are always on contract express or implied. If I hire a man to carry goods from Indianapolis to Cincinnati, and he wrongfully leaves them on the way at Lawrenceburgh, no lawyer will doubt that an action on the case will lie for this breach of duty. The present case is that of a common carrier of persons ; but can there be any difference on the point in question between the carrier of men and the carrier of merchandise ? The authorities to this effect are numerous. I need only cite 1 *Chitty's Pleadings*, 132, 133, 134, and the cases there referred to in support of the doctrine.

I entertain no doubt that both the counts in the declaration are properly counts in case. The demurrer is therefore overruled.

That for a passenger's refusal to pay his fare he may be ejected from the train at any regular station, but not elsewhere ; see *Chicago, Burlington & Quincy R. R. Co. vs. Parks*, 18 Illinois, 460 ; *Terre Haute, Alton, & St. Louis Railroad Company vs. Vanatta*, 21 id., 188 ; *Illinois Central Railroad Company vs. Joseph J. Sutton*, 53 id., 397.

Consult also *Page vs. New York Central Railroad*, 6 Duer, 523 ; *Northern Railroad vs. Page*, 22 Barbour, 130 ; *Hibbard vs. New York and Erie Railroad*, 1 E. D. Smith, 455 ; and 2 Redfield on the Law of Railways, 272-5.
—[Reporter

United States vs. Ebner.

THE UNITED STATES vs. JOHN EBNER.

DISTRICT COURT.—DISTRICT OF INDIANA.—DECEMBER
TERM, 1867.

INDICTMENT UNDER REVENUE LAWS—DEBT.

1. Under the internal revenue laws, when the punishment prescribed is a pecuniary penalty or fine only, and the act fixes the exact amount of it, the action of debt will lie to recover it.

2. Where the punishment provided is a fine only, and the amount of it is not fixed, but left to the discretion of the court, the prosecution for it must be by indictment.

3. In all cases in which the law provides that imprisonment either may or must be any part of the punishment, the prosecution must be by indictment.

McDONALD, J.—This is an action of debt on the thirty-first section of the internal revenue act.

The defendant demurs to the declaration on the ground that debt does not lie for a violation of the provisions of that section.

The section in question, among other things, provides that every person making or distilling spirits shall from day to day make true and exact entry, in a book to be kept in such form as the Commissioner of Internal Revenue may prescribe, of the number of pounds or gallons of materials used for the purpose of producing spirits, the number of gallons of spirits distilled, the number of gallons placed in warehouse and the proof thereof, and the number of gallons sold with the proof thereof, &c. And the section provides that "Any person who shall violate the provisions of this section shall, for every such offense, be liable to a fine of five hundred dollars."

The declaration charges a violation of the provisions above cited, and demands judgment for \$500.

Confining our inquiry to this section alone, I would suppose that a proceeding by indictment is the only remedy for a violation of its provisions.

But pursuing the rule that, in construing a provision in a statute, all its parts must be considered, I am led to a different conclusion.

This act has many requirements on the subject of internal revenue, the violations of some of which are, in terms, punishable by pecuniary penalties, some by fine only, and some by fine and imprisonment. It would be tedious to examine here the numerous sections of the act which relate to these matters. It seems certain, however, that the word "penalty" and the term "fine" are in some parts of the act, used convertibly. Thus, the 14th section declares that every person who shall violate its provisions "shall be liable to a fine or penalty not exceeding five hundred dollars." Here the two terms are evidently employed as meaning the same thing.

The 41st section of the act provides that "it shall be the duty of the Collectors," &c., "to prosecute for the recovery of any sum or sums which may be forfeited by law; and all *fin*es, penalties, and forfeitures which may be incurred or imposed by law shall be sued for and recovered in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, *qui tam* or otherwise." A like provision is found in the 179th section of the act. Here is express authority to *sue* for "fines" arising under this law. The term "sue" is employed in both these sections; and it is inapplicable to a prosecution by indictment. We do not say that a man is sued for a crime. The term always supposes a civil action. Then, for some "fines" imposed by the internal revenue act, it is clear that a man may be *sued* in a civil action—in any "appropriate action." Now, in my opinion, where the act fixes the amount of a pecuniary punishment, whether it calls it a penalty or a fine, an action of debt is an "appropriate action." And for our future guidance in relation to violations of the Internal Revenue Act, I venture to lay down the following rules:

United States vs. Ebner.

1. Where the punishment prescribed is a pecuniary penalty or fine only, and where the act fixes the exact amount of it, the action of debt will lie to recover it.

2. Where the punishment provided is a fine only, and the exact amount of it is not fixed by the act, but is left to the discretion of the court trying the case,—as where the language is that the party shall be fined in any sum not exceeding a certain amount,—there the action of debt will not lie, nor can any other civil action be the “appropriate” remedy, but the prosecution must be by indictment.

3. In all cases in which the act provides that imprisonment either may or must be a part of the punishment, there no civil action will lie, and the only remedy is by indictment.

The demurrer is overruled.

Debt is the appropriate action whenever a demand is for a sum certain, and is capable of being reduced readily to a certainty. 1 Chitty on Pleading, 108.

If a statute prohibit the doing an act under a penalty or forfeiture to be paid to a party grieved, and do not proscribe any mode of recovery, it may be recovered in an action of debt. Ib. 108.

Whenever a statute gives a right to recover damages which are ascertained by the act itself, an action of debt lies and is proper, if no specific remedy is provided. *Blackburn vs. Baker*, 7 Porter, (Ala.) 284.

It has been held in Ohio that debt is the proper remedy for a penalty imposed by a statute, though the amount is uncertain, and is to be fixed by the court between five and fifty dollars. *Rockwell vs. State of Ohio*, 11 Ohio, 130.

Consult also *United States vs. Morin*, ante p. 98.—[Reporter.

Speigle *vs.* Meredith.

GEORGE C. SPEIGLE, *et al*, *vs.* SOLOMON
MEREDITH, *et al*.

CIRCUIT COURT.—DISTRICT OF INDIANA.—JANUARY TERM, 1868.

IN EQUITY.

BILL TO QUIET TITLE—JURISDICTION—SALE OF LANDS BY TRUSTEE.

1. A naked power or trust must be strictly construed.

2. A conveyance of land in consideration of coupon bonds is a *sale* of the land. Such a sale by a trustee empowered to sell the land may be valid, though it is not a sale for money.

3. Where a bill charged that the complainants are the legal owners of lands of which the defendants have forcibly taken possession under a false and fictitious claim of title, but giving no intimation of the nature of the fictitious title, the bill is bad for want of equity on its face. The remedy in such a case is an action at law.

4. BILL MUST ALLEGE JURISDICTIONAL FACTS.—A bill in equity in this court must distinctly state the citizenship of every necessary party to it, and show that the complainants and defendants are citizens of different states. And if it fails to do this, it will be bad on demurrer ; and any decree on it in favor of the complainants would be liable to reversal in the Supreme Court. No appearance, demurrer, or answer to such a bill will waive this omission in it.

R. M Corwin, for complainants.

March & Gordon. for defendants.

McDONALD, J.—This is a bill to quiet title. It states that George C. Speigle and John N. Stoockle, the complainants, are citizens of Ohio ; that Solomon Meredith and Ira Jarrett, two of the defendants, are citizens of the state of Indiana ; and that the residence of four other defendants, to wit : William A. Johnson, Martha V. Johnson, Thomas Ray, and Elizabeth Siver, is unknown. The bill also makes the Cincinnati and Chi-

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cago Railroad company—an Indiana corporation—a defendant.

The bill charges that said railroad company, in May, 1854, had occasion to borrow \$150,000, to effect which the company issued that amount of coupon bonds payable to bearer in five years with ten per cent. interest ; and that to secure their payment, the company executed a deed of trust to the defendant Meredith, and one William Butler, now deceased, on certain Indiana lands, in the nature of a mortgage.

The bill further charges that the deed of trust embodied a provision to the effect that whenever the railroad company should wish to make sale of any part of said lands, and should secure and surrender to the trustees to be canceled an amount of said coupon bonds equal to the appraised value of the land so wished to be sold, then the trustees should execute a conveyance for the same to such persons as the company should designate ; and that in case of the death of either of the trustees, the survivor should make such conveyance.

The bill also charges that on the 27th of July, 1866, and after the death of the trustee, Butler, the complainants were the holders and owners of \$10,500, of said coupon bonds ; that on demand by them of payment, the company failed to pay these bonds for want of funds ; that thereupon, the company offered to sell 160 acres of said lands for said bonds, which offer the complainants accepted, and agreed to take the land at its appraised value as provided in the deed of trust ; and that accordingly the coupon bonds so held by them were delivered to the trustee, Meredith, to be canceled, and he thereupon conveyed said 160 acres of land to them.

After making these allegations, the bill proceeds to say that the defendants, Ira Jarrett, William A. Johnson, Martha V. Johnson, Thomas Ray, and Elizabeth Siver, contriving to injure the complainants, &c., claim to hold said 160 acres of land by some pretended title from said railroad company, which is false and fictitious, and, if made at all, was made without sufficient warrant of law or other authority, and in contravention

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of the rights of the complainants; and that said last named defendants have forcibly taken possession of said land, and wrongfully, unlawfully, and to the great detriment of the complainants, prevent them from enjoying it, and have refused to them the possession of it though often demanded and requested to give up the possession of the land, &c.

The bill prays for the quieting of the title, the cancellation of the defendants' pretended title papers, and the surrender of the possession to them.

The defendants, Jarrett, Ray, William Johnson, and Elizabeth Siver have demurred to the bill, on the ground that "said complainants have not, by their said bill, made such a case as gives the court jurisdiction of the same, or entitles them in a court of equity to any discovery," or to any relief in equity whatever.

Whether this demurrer ought to be sustained, is the question to be decided.

1. In support of the demurrer, it is objected that, on the face of the bill, the conveyance of the 160 acre tract of land is void.

This objection is founded in the provision in the trust deed, already noticed, that the trustee could only convey the land when the railroad company wished to "sell" it; that the power to convey was a naked power dependent on that precedent condition; that such a power must be literally followed and strictly construed; that the condition must be interpreted to mean a *sale* for cash in hand; and that the transaction stated in the bill was not a sale for cash, but a mere barter or exchange.

There can be no doubt that a naked power or trust must be literally followed and strictly construed.¹

But I think that, on the face of the bill, the condition, on which the trustee might, according to the deed of trust, make the conveyance, was strictly and literally followed. A sale of

¹ Hill on Trustees, 478, Williams vs Peyton's Lessee, 4 Wheaton, 77.

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lands does not necessarily suppose a sale for cash. The term barter is not applied to contracts concerning land, but to such only as relate to goods and chattels. Barter is "a contract by which the parties exchange goods."¹ This transaction, therefore, was not a barter.

Now was the transaction an exchange? This term, as applied to lands, "is a mutual grant of equal interests"—"as a fee simple for a fee simple, a lease of twenty years for a lease of twenty years, and the like."² An exchange is a transfer of lands for lands. This, therefore, was not an exchange; for it was a transfer of lands for coupon bonds.

There can be no doubt that a conveyance of lands in consideration of personal property or choses in action, is strictly and literally a *sale*. If A convey his farm to B in consideration of a stock of goods, that is unquestionably a sale of the farm; and it is equally so, if the consideration be public stocks, or corporation bonds.

There is nothing in this objection.

2. In support of the demurrer, it is contended that, on the face of the bill, the complainants have a complete remedy at law; and that, therefore, there is no equity jurisdiction.

The bill shows that the legal title to the land in question is in the complainants. It charges that the defendants who demur have forcibly taken possession of the land, and wrongfully and unlawfully hold it against the rights of the complainants, under a false and fictitious claim of title from the railroad company. It does not in any way describe this title, nor even show that it is in writing. According to the allegations, it is really no title at all—certainly none that would be a defense in an action of ejectment. If the facts stated in the bill are true, these defendants are mere trespassers. And the question is, will a bill in equity lie against such trespassers merely be-

¹ Bouvier's Law Dictionary.

² 2 Blackstone's Commentaries, 323.

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cause they forcibly took possession of the land and hold it, as the bill states, under claim of some "false and fictitious" title ?

Nothing can be better settled than the rule, that equity will not take jurisdiction in a case where the complainants have a plain and complete remedy at law. And this rule is expressly declared in the sixteenth section of the Judiciary Act.

It is equally well settled that a court of equity will not entertain a bill where the title which the complainant seeks to enforce is a merely legal one, and presents no special ground for equitable relief.¹

But the solicitor for the complainants insists that this bill, besides setting up a legal title in them, does present special ground for equitable relief ; and that this special ground is the false and pretended title claimed by the defendants. It can hardly be contended that every claim of a pretended title to land will entitle the legal owner of it to apply to equity for relief. Almost every intruder upon land pretends to some title ; but it amounts to nothing, if it be false and fictitious, and if it be no defense to an action of ejectment by the legal owner. And in no such case will equity aid the holder of the legal title ; for he has a plain and adequate remedy at law.

It is certainly unusual for the legal owner to sue a trespasser, who has turned him out of possession, in a court of equity, merely because the wrong-doer pretends that he has a title to the land. I doubt whether such a case can be found in the books. Perhaps a bill in equity might in such case be sustained, if it shows that the pretended title would be an obstruction to the recovery in an action of ejectment. But, from anything stated in the bill, it cannot be concluded that the defendants' "false and pretended" title would be any obstruction whatever to the assertion of the complainants' rights in an action at law.

The complainants insist, however, that equity has jurisdic-

¹ Hipp vs Babin, 19 Howard, 271.

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tion to remove a cloud from a legal title ; and that for this reason the bill in question is good. It is indeed true that courts of equity often entertain jurisdiction of bills to remove clouds from legal titles. But, in such cases, the bill must show that there really is such a cloud, and that the aid of a court of equity is necessary to remove it. No such thing is shown by this bill. I repeat that, so far as its allegations are concerned, these defendants appear to be mere trespassers. And certainly the mere assertion of a trespasser in possession of lands that he has a title thereto, does not raise such a cloud on the legal title as to justify the interference of a court of equity.

But it is contended that in cases where a plaintiff has occasion to state the title of the defendant, the rules of pleading do not require it to be set out with particularity, because the plaintiff is not presumed to be informed of the particulars of the defendant's title. No doubt this is the rule in pleadings at common law ; and the reason of it equally applies in equity pleading. But in the case of a bill to remove a cloud from a legal title, I think that the bill must show enough to indicate plainly what that cloud is ; and if it consist of a deed of conveyance, it ought, at least, to show who are the parties to it, whether it is prior or subsequent to the complainant's deed, and such other facts as will fairly indicate that it is a serious obstruction to the complainant's rights.

I think the bill shows no cloud whatever on the complainant's title.

3. There is still another fatal defect in this bill, not noticed in the arguments of counsel. The bill, as we have seen, makes Meredith and the railroad company parties. But it is clear they are not necessary parties ; for if every allegation in the bill were true, no decree could go against them. The real parties to the case are Ira Jarrett, William A. Johnson, Martha V. Johnson, Thomas Ray, and Elizabeth Siver. The bill avers that Ira Jarrett is a citizen of Indiana. But, as to the four last-named defendants, there is no averment of citizenship whatever. On the contrary, it avers that their residence is unknown.

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This is a case in which the jurisdiction of this court depends on the citizenship of the parties. In such a case, the citizenship of each party must be stated positively. And the statement must be in terms conformable with those of the Constitution and the Judiciary Act conferring the jurisdiction.¹

It is true that the act of Congress of Feb. 28, 1839,² somewhat alters the rule laid down in the cases above cited, so far as concerns cases where some of the defendants do not reside in the state where the suit is brought. But that alteration does not affect the present question. The rule undoubtedly still is that in every case in this court where its jurisdiction depends on the citizenship of the parties, the citizenship of every necessary party must be distinctly stated in the bill or declaration; and it must appear thereby that every necessary party is capable, so far as citizenship is concerned, of suing or being sued in this court.

Nor is this rule affected by the fact that Ira Jarrett, William A. Johnson, Thomas Ray, and Elizabeth Siver have appeared and demurred to this bill. In courts of general jurisdiction, an appearance and demurrer commonly give jurisdiction over the person so appearing and demurring. But it is not so in the national courts, all of which are courts of limited jurisdiction. Even after a plea in bar has been filed, the defendant may withdraw it, and plead to the jurisdiction.³ And no consent of parties, in such a case as this, can give us jurisdiction.⁴

If without objection to the jurisdiction, this cause should

¹ *Bingham vs. Cabot*, 3 Dallas, 382; *Abercrombie vs. Dupuis*, 1 Cranch, 343; *Wood vs. Wagnon*, 2 do., 9; *Capron vs. Van Noorden*, do., 126; *Winchester vs. Jackson*, 3 do., 514; *Hope Insurance Co. vs. Boardman*, 5 do., 57; *Sullivan vs. Fulton Steamboat Co.*, 6 Wheaton, 450; *Breithaupt vs. Bank of Georgia*, 1 Peters, 238; *Gassies vs. Ballou*, 16 do., 761.

² 5 U. S. Statutes at Large, 321.

³ *Eberly vs. Moore*, 24 Howard, 147.

⁴ *Ballance vs. Forsyth*, 21 Howard, 380.

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proceed to final hearing and decree for the complainants, the decree would be erroneous, and might be reversed.¹

Nothing, therefore, but a statement in the pleadings of the citizenship of four of these defendants, can give us jurisdiction over them. And as the charge against all the defendants against whom under this bill any decree could possibly be rendered, is that of a joint and wrongful trespass and possession under a joint false and fictitious claim of title under the railroad company, jurisdiction of the case as against Jarrett alone, who is alleged to be a citizen of Indiana, could not, in my opinion, be taken for the want of the proper and necessary parties.

Unless, therefore, the complainants take leave to amend their bill, it will be dismissed without prejudice.

The complainants amended the bill.

The general rule is that the power given must be strictly executed. *Perry on Trusts*, §254.

A party out of possession has no right to resort to equity to remove cloud on title. *Herrington vs. Williams*, 31 Texas, 448; *Polk vs. Pendleton*, 31 Maryland, 118; *Barron vs. Robbins*, 23 Michigan, 85; *Lake Bigler Road Co. vs. Bedford*, 3 Nevada, 399; *Branch vs. Mitchell*, 24 Arkansas, 431. *Contra* that he has: *Almony vs. Hicks*, 3 Head (Tennessee), 39.

One in possession may maintain a bill against one out of possession to remove cloud of deed valid on its face, where extrinsic facts must be shown to establish its invalidity. *Crooke vs. Andrews*, 40 New York, (1 Hand), 547; *Newell vs. Wheeler*, 48 New York, 486; *Reed vs. Tyler*, 58 Illinois, 298; *Gage vs. Rohbrach*, id., 262; *Gage vs. Billings*, id., 268.

But there is no cloud where defect is apparent on face, or must appear upon attempt to prove title under it. *Oering vs. Foote*, 43 New York, (4 Hand), 290; and *Meloy vs. Dougherty*, 16 Wisconsin, 269.—[Reporter.

¹ *McCormick vs. Sullivan*, 10 Wheaton, 192.

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GEORGE J. MOORE, *Assignee, &c.*, vs. ZEBULON J. YOUNG.

CIRCUIT COURT.—DISTRICT OF INDIANA.—JANUARY TERM, 1868.

IN BANKRUPTCY.

CHATTEL MORTGAGE

1. **EFFECT OF FILING PETITION.**—The filing by the mortgagor of a voluntary petition in bankruptcy is "an attempt to sell," within the meaning of the usual clause in chattel mortgages.

2. **CHATTEL MORTGAGE—WHEN FRAUDULENT.**—A chattel mortgage on a stock of goods can only be *prima facie* fraudulent, as being out of the usual and ordinary course of business, and its validity may be established by proof.

3. **RECORDING.**—In Indiana an unrecorded chattel mortgage, where the property is not delivered to the mortgagee, is absolutely void, as against the assignee in bankruptcy of the mortgagor.

4. **ASSIGNEE REPRESENTS CREDITORS.**—The assignee is not one of "the parties to the mortgage," but for the collection of assets he represents the creditors, and may sue in every case where they might have sued had the debtor not become bankrupt.

A. C. Downey, for complainant.

Carter, Downey & Gordon, for defendant.

McDONALD, J.—This is a proceeding in chancery under the Bankrupt Law. The bill was filed October 30, 1867. The case it proceeds on is substantially as follows:

On the first of July last, one Shadrach Hathaway and William H. Hathaway were indebted to the defendant Young to the amount of four thousand dollars, for which they executed to him a note for that sum, payable in one year; and, to secure its payment, they executed to him a mortgage on about twelve thousand dollars worth of goods in a store at Vevay,

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in Switzerland County, Indiana. The Hathaways then resided at Rising Sun, Ohio County, Indiana. Of this stock of goods, Young had then, and till August following, the custody as their agent and clerk to retail the same.

On the 28th of August, 1867, the Hathaways were, on their own petition, by this court adjudged bankrupts; and Moore, the complainant, was chosen their assignee in September following.

At the time when the mortgage was executed, and till the time when the bill was filed, the goods in question were kept in a store-house in Vevay, which was held by the Hathaways under a lease for years.

On the 23rd of October, 1867, Moore, as assignee, demanded the possession of said store-house and goods from Young, who refused to deliver them, claiming the right to retain the goods by virtue of the mortgage. The store-house is not included in the mortgage.

The bill charges that Young was not justified in withholding the store-house and goods by virtue of the mortgage,—1, because the store-house is not mortgaged; 2, because no default by the mortgagors has happened entitling the mortgagee, according to the terms of the mortgage, to take possession of the goods; 3, because the mortgage was made in contemplation of insolvency within four months of the filing of said petition in bankruptcy, with a view to give a preference to Young as a creditor of the bankrupts, he then having reasonable ground to believe that they were insolvent, and that the mortgage was made in fraud of the Bankrupt Law; 4, because the mortgage was not made in the usual and ordinary course of business of the Hathaways; 5, because the mortgage is void on its face; 6, because the mortgage was never recorded in the county where the mortgagors resided.

A copy of the mortgage is exhibited with the bill.

The answer filed admits the proceedings in bankruptcy; the appointment of Moore as assignee; that the goods in question are in Young's custody, and are worth eleven thousand eight

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hundred thirty-three dollars and twenty-four cents; and that the mortgage was never recorded in the county where the mortgagors resided. But it denies all fraud; and alleges that the mortgage was made *bona fide*, not in contemplation of bankruptcy or insolvency, without any view to a preference, without any ground to believe that the Hathaways were insolvent or contemplated insolvency, and in the usual course of their business. The answer avers that the assignment in bankruptcy was such an attempt to sell the mortgaged property as, by the terms of the mortgage, entitled Young to the possession of the goods.

A general replication has been filed; and the cause has been submitted for final hearing and decree on the bill, answer, exhibits, depositions, and certain evidence heard on the trial.

If the mortgage was made *bona fide*, on a proper consideration, and not in violation of any of the provisions of the Bankrupt Law, and if it is valid on its face, and is not rendered void as to the assignee by the omission to record it,—I suppose that this action must fail as to the goods. For if, under the facts alleged and proved, Young has a valid lien on the goods, the assignee's course was, not to file this bill, but to apply to the court for leave to redeem the goods from the mortgage lien. Such is the course pointed out by the 14th section of the act and the 17th rule of the Supreme Court. As to Young's refusal to deliver possession of the store-house, the record shows no justification or excuse for it on the part of the defendant. There must, therefore, be a decree against him on this branch of the case.

As to the goods claimed by the defendant by virtue of his supposed mortgage lien; I will consider the complainant's objections to that claim set forth in the bill, in the order in which they are above stated.

1. The complainant urges that no default has yet happened, touching any condition in the mortgage; and that, therefore, the defendant is not entitled to the possession of the goods.

The note, the payment of which the mortgage was intended

to secure, will not be due till July next, so, there has been no default in payment.

The mortgage provides that the goods are to remain in the mortgagors' possession till default be made in payment; but that any attempt to sell the goods, without the consent of the mortgagee, shall entitle him to their possession. Were the proceedings in bankruptcy an attempt to "sell" the goods within this provision of the mortgage? I am inclined to answer this question in the affirmative. On the principle that we must construe such instruments as this most strongly against the makers of them, according to the spirit of them, and according to the intent of the parties, I rather think that the transfer of the goods in the bankrupt proceeding was an attempt to sell them, as a sale of them would be the consequence. And this view, I think, is sanctioned by the maxim, *qui facit per alium, facit per se*. The mortgagor could no more authorize their sale by a proceeding in bankruptcy, than he could sell them himself, without breaking the condition of the mortgage.

2. The bill avers that the mortgage is void, because it was made in contemplation of insolvency within four months next before the filing of the mortgagors' petition in bankruptcy.

The thirty-fifth section of the act provides that transfers of property, made in contemplation of insolvency within four months before proceedings in bankruptcy by or against the party making the transfer, shall be void, the person to be benefited thereby "having reasonable ground to believe such person is insolvent," and that such transfer "is made in fraud of the provisions of" the Bankrupt Law. But the evidence does not bring the defendant and his mortgage within the provisions of this section of the act. On the contrary, it is clearly proved that the mortgagors, in executing this mortgage, did not contemplate insolvency, and did not execute it with intent to violate the provisions of the act; and it is equally well proved that the mortgagee, when he took the mortgage, had no reason to believe that the mortgage was made in fraud of

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the Bankrupt Act, or that the mortgagors were then insolvent, or even under any pecuniary embarrassment.

This objection to the mortgage, therefore, fails for want of proof.

3. The mortgage is objected to as void under the Bankrupt Law, because it was not made in the usual and ordinary course of the business of the mortgagees.

The thirty-fifth section of the act declares that if such a mortgage as the present "is not made in the usual and ordinary course of business of the debtor, the fact shall be deemed *prima facie* evidence of fraud." It is not easy to see precisely what is here meant by the phrase—"the usual and ordinary course of business of the debtor." But I am inclined to think that, upon the evidence, the mortgage in question was made in the usual and ordinary course of business as much as any chattel mortgage could be. It was made to secure an honest debt, part of which was money loaned at the time. But be this as it may, the mortgage could at most be only *prima facie* fraudulent; and I think the evidence plainly overthrows any such *prima facie* presumption against this mortgage.

This objection to the validity of the mortgage, therefore, can not be sustained.

4. Does the omission to record the mortgage in the county where the mortgagors resided render it void as to the assignee in bankruptcy?

The answer to this question must depend on our construction of the Bankrupt Act and of the Indiana statute relating to the recording of chattel mortgages.

As to the Bankrupt Act, the defendant insists, that it gives to the assignee precisely the same rights—neither more nor less—which the bankrupt had before the commencement of proceedings in bankruptcy; and that, as an unrecorded chattel mortgage is confessedly good between the mortgagor and mortgagee, so it must be good as between the assignee in bankruptcy of the mortgagor and the mortgagee. It must be admitted that this view is sustained by many decisions under

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the Bankrupt Act of 1841, and that it is supported by the high authority of Judge Story. Yet nearly all these decisions, except from the rule the case of a fraudulent conveyance by the bankrupt, which is allowed to be good as to the bankrupt himself, but void as to his assignee. This exception has obtained on the ground that such a conveyance is a fraud upon creditors, and that, as the Bankrupt Law took away the right of action by creditors for such fraud, it must be deemed to have vested the same right of action in the assignee,—else the creditors would be without remedy. Does not the reason of this exception equally apply to the case of an unrecorded chattel mortgage? It is very clear that, as to creditors, an unrecorded chattel mortgage, where the property is not delivered to the mortgagee, is absolutely void. And, in the present case, it is certain that if the Hathaways had not been decreed bankrupts, their creditors might have subjected the goods in question to the payment of their debts, notwithstanding this mortgage. But now their right to do so is taken away by the adjudication in bankruptcy; and is it not just as reasonable to suppose that the right vested in the assignee, as that it does so in the case of a fraudulent conveyance? Besides, is it very clear that the failure to record a chattel mortgage, in cases where the mortgagor retains the chattels, is not, in law, a fraud? It is the rule in *Twyne's case*¹ that the retention of possession by a vendor or mortgagor of chattels, is in law conclusive evidence of fraud; and there is no authority which makes such retention less than *prima facie* evidence of fraud upon creditors. The Indiana statute, indeed, so far alters the rule, that if the mortgage is duly recorded the retention of the possession of the goods by the mortgagor is here, perhaps, no evidence of fraud at all. But if the mortgage is not recorded, I think the case is left, as under the statutes of 13 and 27 Eliz., in which such retention of possession is at least *prima*

¹ 3 Coke, 80.

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facie evidence of fraud. In the present case, therefore, the omission to record the mortgage is, in my opinion, a fraud upon the creditors of the bankrupts; and so the case falls literally within the exception to the general rule insisted on by the defendant and supported by the authority of Judge Story.

The third proviso of the fourteenth section of the Bankrupt Act seems to sustain the view here taken. It declares,—

“That no mortgage * * * made as security for any debt or debts in good faith, and for present consideration and otherwise valid, and duly recorded pursuant to any statute of the United States, or of any state, shall be invalidated hereby.”

This provision saves from the operation of the act all prior *bona fide* mortgages made on present considerations, and duly recorded; and it saves no others. The inference from it appears to me to be fair, and even irresistible, that mortgages not so made and recorded shall be invalidated by the Bankrupt Act. And, upon this proviso alone, I would think the mortgage in question void as to the complainant.

The Indiana statute provides that,—

“No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged, as provided in cases of deeds of conveyance, and recorded in the recorder’s office of the county where the mortgagor resides, within ten days after the execution thereof.” 1 *G. & H.*, 352.

It should be noted that this statute is unlike most statutes relating to the recording of deeds and mortgages of real estate, by which, unless recorded within a given time, they are “fraudulent and void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration.” 1 *G. & H.* 261. Under such provisions, the unrecorded instrument is held good as to all men except purchasers and mortgagees in good faith and for valuable consideration; and he who has notice of such unrecorded instrument is not such purchaser or

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mortgagee in good faith, and it is valid even as to him. Whereas, the statute above cited makes the unrecorded mortgage of chattels absolutely void as to all men but "the parties thereto," even though they have notice thereof, the only question, as to the mortgage under consideration, seems to me to be thus: Is Moore, the assignee in bankruptcy, a "party thereto"? Without the aid of any authority, we might well answer this question in the negative: the parties thereto are the mortgagors and the mortgagee only. But in rendering this answer, we are not without authority; we are supported by a controlling authority. The Supreme Court of Indiana, in *Lockwood vs. Slevin*, 26 Indiana, 124, has so decided. That case decides that in the case of a voluntary assignment by an insolvent debtor for the benefit of his creditors, his assignee shall hold the goods assigned as against a prior unrecorded mortgage of them; and that such mortgage is void as to such assignee. And Judge Frazer, who delivered the opinion in that case, says that "the statute expressly enacts that a mortgage of chattels, where the possession is not changed, shall not be valid against any other person than the parties to it, unless it is recorded within ten days after the execution thereof. The language is so plain that no room is allowed for construction. Actual notice can make no difference." This decision is in point. It is a construction of the Indiana statute concerning the recording of chattel mortgages, given by the Supreme Court of Indiana; and it is binding on the courts of the United States.¹ Then, the Supreme Court of Indiana has settled the meaning of the Indiana statute in question, and has held that a prior unrecorded chattel mortgage is void as between the mortgagee and an assignee under a voluntary assignment for the benefit of creditors. If as to such an assignee it is void, the inevitable conclusion must be that it is

¹ *Chicago City vs. Robbins*, 2 Black, 418; *Gelpcke vs. City of Dubuque*, 1 Wallace, 175; *Christy vs. Pridgeon*, 4 do., 196; *Green vs. Van Buskirk*, 5 do., 307.

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void as to an assignee in bankruptcy; for surely the former can have no greater rights than the latter. Indeed there is strong reason to conclude that they are not so great, since the one is a mere volunteer and the whole proceeding voluntary; whereas the other is appointed and controlled by a United States Court, and governed by an act of Congress. But it is enough for the purpose of this decision that the two stand in all respects upon an equality.

In my opinion, it is an error that an assignee in bankruptcy stands in all respects in the condition of the bankrupt, and represents him only. I think that, in the collection of assets, he also represents the creditors; and, as a general rule, may sue in every case in which they might have sued, if the debtor had not become a bankrupt.

Upon the whole case, as made in the bill, the decree must be for the complainant.

In a state where a mortgage is void as to creditors unless recorded, the assignee takes title as against an unrecorded instrument. *Allen vs. Massey*, 4 Bankruptcy Register, 75; *In re Wynne*, do., 5; *Brock vs. Terrell*, 2 do., 190; *Bank of Leavenworth vs. Hunt*, 11 Wallace, 391; *Harvey, Assignee, vs. Crane*, Vol. 2 of this Series, 496, and cases there cited. Nor can the mortgagee rely upon possession taken under his unrecorded mortgage. *Harvey vs. Crane*, last above cited; *In re Hussman*, 2 Bankrupt Register, 140; *In re Manly*, 3 do., 75; *Foster vs. Hackley & Sons*, 2 do., 181; *Bean vs. Am-sink*, 8 do., 228; *Seaver vs. Spink*, 8 do., 218; *In re Morrill, Id.*, 117.

As to what is a sale, in "the usual and ordinary course of business," consult *In re Hunt*, 2 Bankrupt Register, 166; *Rison vs. Knapp*, 4 do., 114; *Darby vs. Lucas*, 5 do., 437; *Judson vs. Kelty*, 6 do., 165.

The assignee, as to parties claiming rights or liens against the estate, represents the creditors, and any transaction which would be void for fraud as against creditors if no petition had been filed, is void as against the assignee. He takes the title, and it is his duty to proceed legally to annul a fraudulent conveyance. *In re Wynne*, 4 Bankruptcy Register, 5; *In re Metzger*, 2 do., 114; *Boone vs. Hall*, 7 Bush, 66; *Bradshaw vs. Klein*, 1 Bankrupt Register, 146; *Pratt vs. Curtis*, 6 do., 189.—[Reporter

HENRY DIXON vs. COLUMBUS AND INDIANAPOLIS RAILWAY CO.

CIRCUIT COURT.—DISTRICT OF INDIANA.—JANUARY, 1868.

1. **FREIGHT BILL**.—is a contract; and its effect cannot be varied by parol evidence.

2. **CONSTRUCTION**.—A freight bill ending "acc't Henry Dixon," and signed "W. T. Noell & Co., Agents," may be construed as made to Henry Dixon, he being in fact the consignee.

3. The words "I & C. Central R. R.," cannot, without an allegation of misnomer, or offer to prove the identity, be taken to mean the Columbus and Indianapolis Railway Co., in a contract not purporting to be made by such company.

4. Where a freight bill is signed "W. T. Noell & Co., Agents," not appearing on its face to be the contract of a railroad company, parol evidence is not admissible to show that it is the contract of the company.

5. **ONUS PROBANDI**.—In the charge of a breach of a common law duty—as the duty of a common carrier—denied by the defendant, the burden of proving the breach is with the party alleging it, whether it is alleged as a mal-feasance or a non-feasance; and he cannot recover without proving it.

6. Where a railroad company received goods for transportation to a point beyond their own terminus, and the plaintiff alleges that they undertook to carry the whole distance by rail, the burden is upon him to prove such undertaking.

7. **LOSS BEYOND CARRIER'S LINE**.—In such case the burden is not upon the carrier to account for the loss, if he has delivered at his own terminus to a proper person.

McDonald & Roach, for plaintiff.

J. S. Ketcham, for defendant.

MCDONALD, J.—This is an action of assumpsit. The declaration contains two counts.

The first count charges that the defendant is a common carrier from Indianapolis, Indiana, to Columbus, Ohio, in the direction of New York, its road forming one of several con-

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necting lines from the city of Evansville to the city of New York; and that on the 12th of October, 1865, the defendant entered into a written contract with the plaintiff, and thereby promised, in consideration of the payment of freight, to transport twenty-five hogsheads of tobacco, worth four thousand dollars, from Evansville to New York by railroad. The count then avers that the plaintiff "shipped" said tobacco on the Evansville and Crawfordsville Railroad, which carried it to Terre Haute and delivered it to the Terre Haute and Richmond Railroad Company, which transported it to Indianapolis, and there delivered it to the defendants, to be by the defendants carried over its road in the direction of the city of New York; and that the defendant failed to deliver said tobacco at the eastern terminus of its road to any connecting line to be transported by rail to the last-named city; but, on the contrary, forwarded it by rail to Baltimore, and thence by water toward New York, whereby the tobacco was lost at sea.

The second count is substantially like the first, except that, alleging no contract in writing, it avers that the defendant engaged to carry the tobacco from Indianapolis to New York "by railroad and not otherwise," and "permitted it to deviate from the said route by railroad," and to be transported part of said distance by water in boats; whereby it was lost at sea.

The defendant pleads the general issue.

By agreement this cause is submitted for trial to the court without a jury.

On the trial, the plaintiff proved the delivery of seven hogsheads of tobacco, on the 12th of October, 1865, to the Evansville and Crawfordsville Railroad Company, and its carriage, by that company, to Terre Haute, thence by the Terre Haute and Richmond Railroad Company to Indianapolis, thence by the defendant's railroad to Columbus, Ohio, thence by a direct railroad line to Benwood, thence by the Baltimore and Ohio Railroad to Baltimore, thence by a steamer

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for New York. The plaintiff also proved that the tobacco never reached New York, and that it would have been worth three thousand and fifty-six dollars and ten cents at New York, had it reached that place in due course of transportation.

The plaintiff also produced in evidence a freight-book of the Terre Haute and Richmond Railroad Company, in which is contained the following manifest:

No. 223. Terre Haute and Indianapolis Railroad Company. Manifest of freight from Evansville to Indianapolis, October 14, 1865.

Description & No. of car	Consignor.	Consignee & destination	No. of packages.	Description of articles.	Weight,	Unpaid freight.	Charges.	Remarks.
Ree 469	W. T. Noell & Co.	Bacon, Clardy & Co., New York.	5	Hhd Strips 10. 1520 5. 1540 tukd 8. 1560. H.D. 4. 1560. 2. 1480.	7680	1802	230 4200	Route, I. & C. Central All rail. William Grayden
			2	Hhd. Leaf. 1. 2050. Mkd 2. 2070. H.I.	4329	784	180	

The plaintiff further proved that William Grayden, whose signature appears to the above manifest, was, at the time when it was made, the defendant's freight agent at Indianapolis. The manifest was read in evidence without objection from the defendant.

Preparatory to the production in evidence of the writing hereinafter copied, the plaintiff further proved that W. T. Noell & Company, mentioned therein, and residing at Evansville, were in October, 1865, the agents of the defendant to solicit and procure freight to be passed over the railroad of the defendant; that said W. T. Noell & Co. executed the said writing, and that about that time they executed many other writings, all which the defendant had recognized and ratified as being done by the said W. T. Noell & Co. as the defendant's agents. This latter evidence was given under the objection of the defendant.

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The plaintiff thereupon offered in evidence said writing, which is as follows:

W. T. NOELL & Co., Forwarding and Commission Merchants, and agents for the Great Eastern Express Line, *via* Evansville and Indianapolis.

THROUGH BILL OF LADING.

Evansville, Indiana, October 12th, 1865.

Received from W. T. Noell & Co., in apparent good order, the articles described below, contents and value unknown, which are to be transported to Terre Haute by the Evansville and Crawfordsville Railroad Company, and thence *via* Terre Haute and Richmond Railroad and connecting roads, I. and C. Central R. R., all rail, to Messrs. Bacon, Clardy & Co., at the customary place of delivery in New York, he or they paying freight at the rate — cents, if of first class; if of 2d class, — cents; if of 3d class, 80 cents; if of 4th class, per 100 pounds, — cents; per bbl., — and charges as below.

And it is agreed and is a part of the consideration of this contract, that the several carriers and parties in whose charge said goods may be, between this and the place of delivery, are not to be held responsible for any loss or damage arising from the danger of the seas, or railroad, canal, river, or lake transportation, or from providential causes; for delay of perishable articles, or for loss or damage to packages, the bulk of which renders it necessary to forward them in open cars; or from fire from any cause while in transit or at stations; nor for any accident or delay from any unavoidable cause. And it is further agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for, whereby any legal liability or responsibility shall or may be incurred, that company shall alone be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, damage or detriment. ~~It~~ It is understood that the shipper, in accepting this bill of lading, agrees to all its terms and conditions.

H. D. Marks.												Articles.	Weight	Charges
1	2	8	4	5	6	7	8	9	10	11	12			
1480	1480	148	1560	1540	1500	1460	1560	1460	1520	1570	1510			
	1		2									12 Hds Strips,		
	2250		2070									2 do Leaf Tobacco.		\$42.00

Sell leaf in New York, and forward strips to Messrs. Robert Kerr & Son, Liverpool. Acc't Henry Dixon, Esq., Henderson, Ky.

W. T. NOELL & CO., Agents.

The defendant objected to this paper as evidence; *first*, because it is only a receipt, and not a contract; *secondly*,

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because on its face it does not purport to be a contract, of the defendant. These objections were held over till the final decision on the evidence; and I now proceed to decide them.

1. It is argued that this writing is not a contract, but a mere receipt. Certainly, in its general features, it seems to be a bill of lading; and a bill of lading is always a contract—one which, according to the authorities, may be assigned very much like a note or bill of exchange.¹

Singularly enough, however, at first sight this would seem to be a bill of lading executed by W. T. Noell & Co. to W. T. Noell & Co., for it is signed by that company, and it begins with these words: "Received from W. T. Noell & Co.," and if it is a receipt made by them to them it is a nullity. But, on a closer inspection, we find that it ends thus: "*Acc't of Henry Dixon, Esq., Henderson, Ky.*" In view of this language, and of the maxim that written contracts should, if possible, be so construed *ut res magis valeat quam pereat*, I am inclined to hold the instrument as being made to the plaintiff, Henry Dixon.

If I am right in construing this to be a bill of lading made to the plaintiff by W. T. Noell & Co., there can be no doubt that it is a contract. For it contains an express agreement as to the liabilities of the carriers. Indeed, it seems very plain that it is a receipt and a contract both.

2. It is insisted that this bill of lading does not on its face, even *prima facie*, purport to be the contract of the defendant.

It appears to me that this objection is well taken. The name of the defendant does not appear in it. It is true that, in stating the route which the tobacco was to take, it has this phrase: "I. & C. Central R. R." But this is not the name of the defendant or the defendant's road. If the phrase had been the "*C. & I. Central R. R.*," perhaps the court ought to construe it to mean the defendant's road. But

¹ Conard vs. The Atlantic Insurance Co., 1 Peters, 886.

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as there is no allegation of a misnomer in the declaration, and no offer to prove that the "*I. & C. Central R. R.*" means the *Columbus & Indianapolis Railway*, I think the court cannot officially take notice of such meaning.

On its face, then, this bill of lading does not appear to be the contract of the defendant, and the question is, Can the plaintiff be permitted by parol evidence, to prove that it is the defendant's contract? I think he cannot. I think that, on its face, the bill of lading is the receipt and contract of W. T. Noell & Co., and not of the defendants. The general rule, that parol evidence is inadmissible to add to or vary the terms of a written contract, is too well settled to require any citation of authorities, and I see no reason for not applying this general rule to the contract in question. It has been applied in several cases.¹

The circumstance that, to the signature of W. T. Noell & Co., to this bill of lading, is added the term "agents," amounts to nothing. If, on examining the whole bill, we do not construe it so as to make Noell & Co. "agents for the Great Eastern Express Line," whatever that may be, I think we must regard the term "agents" attached to their signature as mere *descriptio personarum*.²

The plaintiff insists that the case of *The Mechanic's Bank vs. The Bank of Columbia*, 5 Wheaton, 326, is in point to show that parol evidence to aid this bill of lading is admissible. In that case the check sued on was as follows:

"Mechanic's Bank of Alexandria, June 25, 1817.

Cashier of the Bank of Columbia: Pay to the order of P. H. Minor, Esq., ten thousand dollars.

W. PATTON, JR.

The question was, whether the Mechanic's Bank was liable on this check, and it was decided in the affirmative. And

¹ *Higgins vs. The U. S. Mail Steamship Co.*, 8 Blatchford, 282; *The Reeside*, 2 Sumner, 567; *Goodrich vs. Norris*, Abbott Admiralty R., 196.

² *McClure, et al. vs. Bennett*, 1 Blackford, 189; *Hobbs, et al. vs. Cowder*—20 Indiana, 810; *Pentz vs. Stanton*, 10 Wendell, 271.

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the court said that "the appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate and not an individual transaction." "The evidence, therefore, on the face of the bill predominates in favor of its being a bank transaction." This ruling goes as far as I would be willing to follow. But, whether right or wrong, the case is evidently different from the one at bar. The ground of the decision was that because the name of the Mechanic's Bank was at the head of the draft, it was *prima facie* the act of the bank. But in the present case, the defendant's name is not at the head of the bill of lading, or any where in it or on it. No one looking at it could suppose that it is a contract by the Columbus & Indianapolis Central Railway Company.

On the whole, then, I rule out the bill of lading as evidence against the defendant.

On this ruling, the plaintiff cannot recover on his first count. For as it is on a written agreement, and as he shows no such agreement in evidence, there is a failure of proof to sustain it.

It remains to be inquired whether the evidence sustains the second count of the declaration.

This count, as we have already seen, is on a parol contract. It charges that the defendant received the tobacco in question at Indianapolis, and, on sufficient consideration, promised to carry it by railroad to New York, and, in violation of that promise, permitted it to deviate from said route by railroad, and to be transported part of said distance by water, in boats. Are all these allegations substantially proved?

I think it is fair to conclude from the evidence, that the defendant did receive from the plaintiff, at Indianapolis, the tobacco in question, and did promise to carry it to Columbus, Ohio, and there to deliver it to some other railroad carrier for transportation on a usual and safe route all the way by rail to New York. I conclude also from the evidence, that, if the defendant did so carry the tobacco to Columbus, and did so

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deliver it there to some other railroad company whose track formed a link in a usual and fair line of transportation by rail to New York, directing it to be so transported, the defendant is not liable in this action.

There is not the slightest evidence that the defendant promised to carry the tobacco to New York by rail or any other conveyance. But, as the defendant must be presumed, from the manifest shown in evidence, to have known that the plaintiff intended that his tobacco should be carried all the way by rail to New York, and as the defendant with this knowledge undertook to carry the goods to Columbus, an implied obligation followed to deliver the tobacco there on some other road forming a link in a proper and usual line of transportation by rail to its destination in New York, and to notify the party to whom the same was so delivered of the plaintiff's direction to have it carried all the way by rail. Did the defendant do this? And if there is not evidence on any point included in this duty, what is the legal presumption? The answers to these two questions must decide the plaintiff's right to recover on his second count.

1. Did the defendant carry the goods to Columbus, and there deliver them to some other company whose road formed a link in a proper and usual line of transportation by rail from Columbus to New York, and notify the company to which such delivery was made of the plaintiff's direction to carry all the way by rail?

It is clearly proved that the defendant carried the goods to Columbus. It is also clear that, at that city, the defendant delivered the goods to a company whose railroad led directly to Benwood, the western terminus of the Baltimore and Ohio railroad; and that they were carried on the two last-named roads from Columbus to Baltimore. At Baltimore, it appears that the tobacco was put on a steamer to be carried by sea to New York. The evidence adduced by the defendant also proves that from Columbus to New York there are several usual and proper through freight railroad lines; and that one

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of these is by the way of Benwood and Baltimore, though it is not the nearest and most direct line. It is certain that the tobacco might have gone all the way by rail on this line to New York; that it was a usual and proper line for freight transportation to that city from Columbus, Ohio; and that, for sending the tobacco on that line, the defendant, therefore, is not chargeable with any breach of duty. But did the defendant in delivering the tobacco to be carried on this line properly direct that it should be carried all the way by rail? On this point there is no evidence.

2. The only remaining question, then, is, What is the legal presumption? The defendant having performed all the other duties of a carrier, ought we to presume, in the absence of all proof, that on the delivery of the tobacco at Columbus to be carried by the route past Benwood and Baltimore to New York, the defendant properly directed that such carriage should be all the way by rail? In other words, as to this point, on whom does the burden of proof devolve? If the plaintiff had proved the allegation in his second count, that the defendant, for valuable consideration, promised to carry the tobacco all the way by rail to New York, this question would be unimportant. But as there is not sufficient proof of that promise, the question, I think, is the turning point in the case.

It is, indeed, a general rule that he who affirms a proposition must prove it. To this rule, however, there are many exceptions, especially in charging breaches of common law duties. For, in general, a court ought not to presume such a breach of duty without proof. And in those cases in which the plaintiff grounds his right of action upon a negative allegation, and, where, of course, the establishment of this negative is an essential element in his case, the burden devolves on him to prove the negative.¹

Such is the present case. The averment as to the defend-

¹ 1 Greenleaf's Evidence, §78

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ant's breach of duty concerning the tobacco, is that the defendant "*permitted* it to deviate from the said route by railroad and to be transported part of said distance by water in boats." Now if this word "*permitted*" is to be construed as the charge of some wrongful *act* by the defendant, the allegation is affirmative; and so the necessity on the plaintiff to prove it would be unquestionable. But if it is to be deemed—as I think it should be—merely an allegation of an omission of duty, then it is substantially a negative averment, on which, in the language of Professor Greenleaf, "the plaintiff grounds his right of action;" and still, I think, according to the rule above laid down and to the reason of the thing, it devolved on the plaintiff to prove the omission of that duty.

The plaintiff, in order to escape this conclusion, insists on the application of another rule, namely, that where the action is founded on a negative allegation, and the affirmative is peculiarly within the knowledge of the defendant, the burden is on the defendant to prove such affirmative. No doubt this is law. I do not think, however, that it is applicable to the point under consideration. It is mostly applied to charges of unlawfully performing things without a written license,—as to retailing liquor without a license. Here, if there is a license, the defendant is supposed to have possession of it; and if he does not produce it, it is fair to presume he has none. But in the case at bar, it ought to be presumed, in the absence of evidence to the contrary, that the defendant gave directions to carry the tobacco by rail to New York, and that those directions were in writing, and were delivered with the tobacco to the next carrier. The matter of such directions, therefore, was not peculiarly within the knowledge of the defendant.

It is also insisted on behalf of the plaintiff that, thought no presumption of the breach of a common law duty on the part of a common carrier ought to be indulged in the absence of the evidence, yet, when the plaintiff proves, as in this case, the loss of his goods, the burden of accounting for that loss

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devolves on the carrier. This is undoubtedly the general rule; but I think it is inapplicable to the present case. It applies to losses happening while the goods are under the care or control of the carrier; and it should not be extended to cases of loss after the carrier has taken the goods to the proper place, and delivered them to the proper person. Here, I repeat, there is no evidence that the defendant engaged to carry the goods beyond Columbus, Ohio. The goods were lost at sea hundreds of miles beyond the eastern terminus of the defendant's road. The proof of such a loss, in my opinion, does not cast on the defendant the burden of accounting for that loss.

Upon the whole, I think the plaintiff cannot recover on this evidence. He may be non-suited if he please, else I shall find for the defendant.

The plaintiff submitted to a non-suit.

So far as bills of lading and other writings are mere *receipts*, they may be contradicted by parol, but so far as the writing contains terms of a contract it stands on the same footing as other written contracts. Thus a bill of lading receipting goods as in good order and well conditioned, may be contradicted by showing that their internal order and condition was bad, and any other fact erroneously recited. 1 Greenleaf on Evidence, §805 and notes.

As to how far bill of lading is a contract, and how far a receipt, consult 1 Parsons on Shipping and Admiralty, 190, 191 and notes; 3 Kent, 206; *The J. W. Brown*, Vol 1 of this Series, 78, and cases cited; *The Wellington, Ib.*, 279.

As to the shipment, it is not conclusive evidence between the original parties. *Grant vs. Norway*, 10 Common Bench R., 665; *Bates vs. Todd*, 1 Moody and Robinson, 106; *Berkley vs. Watling*, 7 Adolphus and Ellis, 29.

Though it appears to have formerly been the general rule that the contract must show on its face, that a person other than the executing party is the principal, or such principal is not bound, yet this would seem to hold now only in cases of solemn instruments under seal; and the authoritative rule now is that where the agent makes a contract, apparently in his own name, but really for his principal, his principal is liable. The difference being that the agent also makes himself personally responsible. Mr. Justice Story says "there is no doubt that parol evidence is admissible on behalf of one of the contracting parties to show that the other was an

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agent * * * although contracting in his own name, so as to fix the real principal."

Story on agency, §270, also §§110, 147, 160, 161, 162, 269, 392; Smith's Leading Cases, 226, and cases cited; Chitty on Contracts, 11 Am. Ed., 149, note (y'); 303, note (o); 309, note (h); *Higgins vs. Senior*, 8 Meeson and Welsby, 834; *Dykens vs. Townsend*, 24 New York, 57.

Mr. Parsons, in his work on Contracts, Vol. 1, page 55, states the general rule to be, "Parol evidence may always be admitted to *charge* an unnamed principal; but not to discharge the actual signer." Consult also notes to same page, and page 549.

Common carrier under special contract limiting his liability has no authority to contract with next carrier for a limited responsibility. *Babcock vs. Lake Shore & Michigan Southern R. R. Co.*, 49 New York, 491.

Effect of marks showing ultimate destination and using printed blank adapted to through contract. *Id.*

Where a common carrier contracts for the transportation over his route and delivery to connecting line, the fact that the contract fixes the price for the entire carriage does not make it a through contract, so as to entitle the succeeding carriers to the benefit of exceptions from liability contained in the contract. *Aetna Insurance Co. vs. Wheeler*, 49 New York, 616.

In a contract by a carrier to transport and deliver to a point beyond its own line, an exception as to liability extends to connecting lines who share the freight. *Maghee vs. Camden & Amboy R. R. Transportation Co.*, 45 New York, 514.

Under an agreement to carry freight to a point beyond the terminus of its own line, a railroad company is liable for the default of a connecting line; but the mere receiving goods marked for such a point only binds the carrier to deliver to the next carrier. *Root vs. Great Western R. R. Co.*, 45 New York, 524.

For an elaborate discussion of the liability of common carriers on through bills of lading, and what constitutes a through bill, and under what circumstances a carrier is discharged from further liability by delivery at his own terminus to a connecting carrier for further transportation, consult *Woodward vs. Illinois Central R. R.*, Vol. 1 of this Series 403 and 447, and cases there cited—also a recent opinion by the U. S. Supreme Court. *Railroad Co. vs. Manufacturing Co.*, 16 Wallace, 318.

The rule adhered to by the Illinois Supreme Court is that a carrier receiving goods marked beyond his own route is liable for their delivery at their ultimate destination. *Illinois Central R. R. Co. vs. Copeland*, 24 Illinois, 332; *same vs. Johnson*, 34 do., 389; *same vs. Frankenberg*, 54 do., 88.
—[Reporter.]

In re Drummond.

In re JOHN T. DRUMMOND.

CIRCUIT COURT.—DISTRICT OF INDIANA.—JANUARY, 1868.

IN BANKRUPTCY.

PREFERENCE—SURRENDER.

1. No creditor of a bankrupt, who obtains a fraudulent preference from him, can take any benefit thereby.

2. Every creditor receiving a fraudulent preference, who, after adjudication of bankruptcy, and before he is sued on account of such preference, voluntarily surrenders to the assignee all property, money, and advantage received by him under such preference, may prove his debt and have his dividend in like manner as if no preference had been given. But he forfeits all right to prove his claim or have a dividend, if he fails voluntarily to deliver up what he has obtained under such preference, or only delivers it up at the end of a law-suit.

Hendricks, Hord & Hendricks, for Keen & Co.

Rand & Hall, for opposing creditors.

MCDONALD, J.—On the petition of some of his creditors, this court, several months ago, declared Drummond a bankrupt. The matter was then referred to the proper register, before whom those creditors proved their claims.

Afterwards, January 13, 1868, Keen & Co., of Cincinnati, as creditors of Drummond, presented to the register proper proof of a claim of theirs amounting to eleven hundred and sixty-eight dollars and ninety-three cents. This proof was sufficient for the allowance of the claim, if the objection made to it, as hereinafter stated, does not preclude its allowance.

On the presentation of this claim, the creditors, on whose petition said adjudication of bankruptcy was obtained, appeared before the register, and, in resistance of the allowance

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of the claim, filed a written statement of their objections to it.

This statement is substantially as follows:

That on the 20th of March, 1867, Drummond, being a bankrupt, and in contemplation of insolvency, for the purpose of giving to Keen & Co., and to certain other creditors, a fraudulent preference, sold to one Trimble and one Read two hundred acres of land at one thousand dollars, and his stock of merchandise at the price of four thousand five hundred and seventy-five dollars, making together the aggregate sum of five thousand five hundred and seventy-five dollars, thereby paying to them a debt of fifteen hundred dollars which he owed them, and taking for the residue of the five thousand five hundred and seventy-five dollars their notes for upwards of two thousand dollars, and causing them to execute to said Keen & Co. a note for upwards of eight hundred dollars, and causing the said land to be conveyed to Keen & Co. and to Howe, Pumfrey & Co. (other creditors of Drummond), and transferring book accounts to the amount of sixteen hundred dollars to the two last-named companies; that all this was done fraudulently to pay and prefer Keen & Co. in regard to the same claim which they are now seeking to have allowed; that Keen & Co. accepted said payment and preference, having reasonable cause to believe that a fraud was, in said transactions, intended by Drummond on the Bankrupt Act, and that he was insolvent, and owed three thousand dollars not provided for in said transfers; that said transfers were the very grounds on which Drummond was adjudged a bankrupt; and that after Bradshaw was appointed his assignee, Keen & Co., on his demand, delivered over to the assignee all the money, notes, accounts, and other property so received by them by way of payment and preference as aforesaid, admitting that they held them in fraud of the Bankrupt Act, and that they had received them with a knowledge of the insolvency of Drummond.

Keen & Co. contended before the register that these objec-

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tions, even if they were all true, did not preclude the allowance of their claim. They also denied that they ever had reasonable cause to believe that Drummond, in making said payments and transfers, intended a fraud on the Bankrupt Act, or was insolvent.

On these points an issue in law, as well as an issue of fact, was made before the register; and he, with the consent of all parties, certifies these issues to me for trial.

The issue in law presents for my decision this question:

On the supposition that all the matters set forth in said written statement are true, do they preclude the allowance of the claim in question?

It cannot be doubted that if a fraudulent payment was made, or a fraudulent preference given, by Drummond to Keen & Co., and if the latter received such payment or preference with notice of such fraud on the part of Drummond, their claim cannot be allowed so long as they retain the benefit of such payment or preference. But they contend that, having turned over to the assignee everything which constituted such payment and preference, and put all parties and all assets *in statu quo*, they are now precisely in the same condition as if they had never received any payment or preference. Whether this is so, must depend on a proper construction of the provisions of the Bankrupt Act relating to the question.

There are but two sections in that act which throw any light on the subject. Section 23 provides that:

“Any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom, until he shall first have surrendered to the assignee all property, money, benefit or advantage received by him under such preference.”

The 39th section, after pointing out the various grounds on

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which a debtor may be forced into bankruptcy by his creditors,—and among the rest, the transfer of money or property in violation of the Bankrupt Act,—declares that if any person “thall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, assigned, sold, or transferred contrary to this act: *Provided*, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, and that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy.”

At first view, these two provisions of the act seem to be irreconcilable. And if they really are so, then the former must fall and the latter prevail. Such is the rule in regard to repugnancies in a statute.¹

But this rule is not to be resorted to till all other rules of interpretation fail; for it is the duty of courts, if possible, to give effect to every part of a statute, and to hold no part of it void.

Let us then inquire whether any reasonable construction can be given to the two provisions of the Bankrupt Act above cited, so as to make them both stand consistently with each other.

It is suggested by the creditors who oppose the allowance of the claim of Keen & Co., that the apparent repugnance in question may be reconciled by construing the clause cited from the 23rd section as only applying to cases of voluntary bankruptcy, and the provision copied from the 39th section as relating only to cases of involuntary bankruptcy. This suggestion is, at first blush, plausible; but I think it cannot bear a strict scrutiny. And, for the following reasons, I am disposed to reject it:

First. The provision in the 23rd section is too comprehensive to be restricted to cases of voluntary bankruptcy. In

¹ Dwarris on Statutes, 660

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terms it applies to "*any person*" who accepts "*any preference*," having reasonable cause to believe that the same was made or given by the debtor "*contrary to any provisions*" of the Bankrupt Act. This language as plainly and as strongly applies to involuntary as to voluntary bankruptcy; and to confine it to voluntary cases only, would be doing violence to the express words of the section.

Secondly. Such a construction would be unfair and unjust as between preferred creditors. The creditor who receives a preference from a debtor, who is afterwards forced into involuntary bankruptcy, is certainly chargeable with no greater wrong than the creditor who receives a like preference from a debtor who subsequently becomes a voluntary bankrupt. In equity and conscience, they occupy the same ground. And if they both repair the wrong, by delivering up to the assignee whatever they received by way of preference, and thus equally put everything *in statu quo*, it would be most unfair to hold that in the voluntary case the creditor shall have his dividend, and that the creditor in the involuntary case shall be utterly precluded from asserting any claim on the estate of the bankrupt. Such a construction is so glaringly inequitable, that I cannot presume that Congress intended it.

Counsel for Keen & Co. suggest that the provision cited from the 39th section is applicable only to such preferred creditors as do not voluntarily deliver up the money or property by which they obtained the preference, but hold to it till it is forced from them by a lawsuit. I am inclined to adopt this interpretation. It does no violence to the language of the provisions in question; and it reasonably reconciles the portions of them which on first view would seem repugnant. Moreover, I think the language cited from the 39th section will fairly bear this construction. That language is that "the assignee may recover back the money or other property so paid, conveyed, assigned, sold, or transferred, contrary to this act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act

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was intended, or that the debtor was insolvent; and *such creditor* shall not be allowed to prove his debt in bankruptcy. Now, whom does the phrase "such creditor," in this provision, comprehend? Does it mean all preferred creditors in bad faith? Or does it only refer to such creditors, as in bad faith have received a preference, and have refused to disgorge it till it was forced from them by a lawsuit? The phrase "such creditors" must refer to some creditors named before in the act. Grammatically, it is in the nature of a relative pronoun; and, like a relative pronoun, it has reference to an antecedent; and the rule in law, as in grammar, is that it generally refers to the last antecedent to which it may fairly apply. Here the last antecedent is obviously the preferred creditor whom the assignee in an action at law has forced to give up the money or property by which such creditor acquired a preference. To this sort of creditor only, I think, does the phrase "such creditor" apply; and surely it does no violence to any words or provisions of the act, so to apply it. On the contrary, I think that such a construction aids the other provisions in question by giving force and effect to them all, and is, at the same time, fairly consistent with all the words of the 39th section. No unfair, unjust, or absurd consequences follow this construction. It leaves the *locus penitentiae* to every preferred creditor, whether in a case of voluntary or involuntary bankruptcy. It in effect says to him, If you will voluntarily surrender the property or money by which you obtained a fraudulent preference, and thereby put all parties interested *in statu quo*, you may have a fair dividend in the bankrupt's assets; but if you hold on to your unjust preference till it is forced from you by a lawsuit, and thus delay the proceedings in bankruptcy, to the injury of honest creditors, you shall, as a just punishment for your obstinacy and your fraud, be entirely precluded from asserting any claim on the assets of the bankrupt arising out of your fraudulently preferred debt.

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I think, therefore, that the following rules are fairly deducible from these two sections of the Bankrupt Law:

1. Every creditor, who receives a preference by way of payment of his debt, or security for it, having at the time reasonable cause to believe that the debtor is insolvent, or intends by such preference to violate any of the provisions of the Bankrupt Law, shall take no benefit by such preference.

2. Every creditor, receiving any fraudulent preference, who, after adjudication of bankruptcy, and before he is sued on account of such preference, shall voluntarily surrender to the assignee all property, money, benefit, and advantage received by him under such preference, may prove his debt and have his dividend, in like manner as if no preference had ever been given him.

3. Every creditor receiving any fraudulent preference, and not voluntarily surrendering the property, money, &c., which gave him such preference, or not surrendering the same till he is forced to do so by suit, shall, as a punishment for his fraud and obstinacy, forfeit all right to prove the debt so preferred, or to claim any dividend thereon.

With these views I must decide, as I do, that on the supposition of the truth of all the matters set out in the written statement filed by the creditors who oppose the allowance of the claim of Keen & Co., they are nevertheless entitled to have their claim allowed, and to have their just dividend thereon.

It follows that there is no necessity for me to try the issue of fact certified to me; for, even if that issue were decided against Keen & Co., they would be allowed their claim and dividend.

It is ordered that the clerk certify this decision to the register.

The surrender of a fraudulent preference must be made before judgment, but it lies in the discretion of the court to allow the creditor to surrender after suit brought and before judgment. *In re E. R. Stephens*, vol. 8, p. 187 of this Series. See *In re Kipp*, 4 Bankruptcy Register, 190.

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A voluntary surrender, absolves the creditor from fraud and allows him to prove his debt, but not otherwise. *In re Davidson*, 3 Bankruptcy Register, 106; *In re Hunt, et al.*, 5 do., 433.

A fraudulent conveyance cannot be surrendered so as to allow the creditor to prove his claim. *Bingham, assignee, vs. Richmond*, 6 do., 127; *same vs. Frost*, and *same vs. Williams*, Id., 130.

Paying a judgment recovered against the creditor is no surrender. *In re Tonkin and Trewartha*, 4 do., 13.—[Reporter.

THE LEWELLEN.

DISTRICT COURT.—DISTRICT OF INDIANA.—MAY, 1868.

IN ADMIRALTY.

1. JURISDICTION ON OHIO RIVER.—The admiralty jurisdiction of the national courts extends over the river Ohio.

2. POWER OF CONGRESS.—The power granted by the Constitution to Congress "to regulate commerce with foreign nations and among the several states," includes the authority, not only to pass laws regulating trade, but also navigation and intercourse.

3. ADMIRALTY JURISDICTION.—The United States district courts have exclusive original jurisdiction of all civil causes of admiralty and maritime cognizance

4. The act of July 4, 1864, must be regarded as a navigation law.

5. NEGLECT TO PUT SYNOPSIS OF LAWS ON STEAMER—PENALTY.—A proceeding *in rem* is the proper mode of prosecution for the violation of the 8th section of the act of July 4, 1864, charging a neglect to post up in conspicuous places in a steamer, synopses of the laws relating to the carriage of passengers, as required by that section.

6. PRACTICE—SEIZURE.—In proceedings *in rem* against vessels for penalties and forfeitures under acts of Congress, it is a general rule that a seizure of the vessels must precede the filing of the libels, in order to give jurisdiction

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to the court; and that consequently such precedent seizure must be averred in the libel. But, if under the act of Congress, the owners execute delivery bonds, they thereby waive the objection of the want of a prior seizure.

7. DUTY OF STEAMER AS TO POSTING SYNOPSIS OF LAWS.—The act of July 4, 1864, requiring that *two* copies of the synopsis of the laws relating to passengers on steamers, shall be posted up in every licensed and enrolled vessel carrying passengers, *one* copy thus posted up is no defense against a prosecution for a violation of the act.

8. *Held*, also, that if the owners of the steamer could not procure copies of the synopsis elsewhere, they were bound, at their peril, to apply for them to the Secretary of the Treasury; and that if they failed to do so, and proceeded on a voyage without the copies, the penalty was thereby incurred.

A. Kilgore, U. S. District Attorney, and *C. E. Marsh*, for United States.

Hanna & Knefler, for respondents.

MCDONALD, J.—The libel in this case charges, that, on the 3d of September, 1867, at Evansville, Indiana, a port of delivery, the steamer Lewellen, being engaged in navigating the Ohio River along the coast of Indiana, carrying cabin and steerage passengers for hire, and being then and there temporarily landed and moored to the shore at Evansville in the regular course of passage on said river, and being wholly propelled by steam and subject to enrolment and license under the laws of the United States, the master and owners of said boat then and there wrongfully and unlawfully failed, neglected and refused to place and keep in conspicuous places on the boat two copies of a synopsis of such of the laws of the United States relating to the carriage of passengers and their safety on board of vessels propelled in whole or in part by steam, as had been theretofore prepared and published by the Secretary of the Treasury. The libel avers that said synopsis had been published and printed, and that copies of it might readily have been obtained by said master and owners. The libel alleges that, by reason of said negligence, a penalty of one hundred dollars has been forfeited to

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the government; and it prays the proper process, the seizure of the steamer, and judgment, &c.

On the filing of this libel, a warrant was issued, by virtue of which the marshal seized the boat and detained her until the owner, by executing a bond under the provisions of the act of March 3, 1847, procured a re-delivery of the boat to him.

The owners appear to the action, make claim, and demur to the libel; and the point to be decided is, whether the demurrer should be sustained.

This prosecution is founded on the 8th section of the act of July 4, 1864.¹ That section provides:

"That the Secretary of the Treasury shall cause to be prepared a synopsis of such of the laws relating to the carriage of passengers and their safety on vessels propelled in whole or in part by steam, as he shall think expedient, and have the same printed in convenient form to be framed under glass, and give to any such vessel two copies, on application of its owner or master, who shall, without unnecessary delay, have the same framed under glass, and place and keep them in conspicuous places in such vessel in the same manner as is provided by law in regard to certificates of inspectors; and no clearance shall be issued to such vessel, until the collector or other chief [officer] of the customs, shall be satisfied that the provisions of this section shall have been complied with by such owner or master; and in case such owners or master shall neglect or refuse to comply with [the] provisions of this section, he or they shall furthermore forfeit and pay for each offense one hundred dollars, and such fine shall be a lien upon the the vessel until paid."

In support of the demurrer, three objections are urged,—*first*, that the remedy in this case is an action of debt, not a libel *in rem*; *second*, that the libel does not sufficiently allege that the Secretary of the Treasury prepared the synopsis in question, or that there is alleged a willful neglect to apply to him for it; *third*, that the libel is bad, as not averring a seizure of the vessel before the libel was filed. We will examine these objections in the order here stated.

I. It is insisted that the action in this case should have been debt, and not a libel *in rem*.

¹ 18 U. S. Statutes at Large, 390.

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It is observable that the section on which the action is founded says nothing about the form of the remedy. It only declares the penalty, and makes it a lien on the steamer.

It may be that, on common law principles, an action of debt would lie to recover the penalty in question. But in that case, I rather think the government would abandon the lien given on the steamer by the statute. Indeed I know of no method by which that lien could be asserted at common law.

But the objection under consideration does not directly present the question whether an action at common law would lie for this penalty, but whether the offense charged is within the admiralty jurisdiction of this court.

That the admiralty jurisdiction of the national courts extends over the river Ohio, is too well settled to admit the least doubt.¹

Along with the power on the part of Congress "to regulate commerce with foreign nations, and among the several states,"—which includes not only trade, but navigation and intercourse—the Constitution extends the judicial power of the national courts "to all cases of admiralty and maritime jurisdiction."² The power to regulate commerce among the several states undoubtedly authorized Congress to pass the law under which this penalty is claimed; and the constitutional provision, extending the judicial power over "all cases of admiralty and maritime jurisdiction," as certainly empowered Congress to give the remedy, in cases of the kind under consideration, to the admiralty courts.

The 9th section of the Judiciary Act gives to the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade."³ The act of July 4, 1864, on which this suit is founded must be classed with

¹ The Propeller *Genesee Chief vs. Fitzhugh*, 12 Howard, 443.

² Story on the Constitution, §1663.

³ 1 U. S. Statutes at Large, 77.

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our "navigation laws;" and if so, it would seem that the 9th section of the Judiciary Act expressly gives to this court, as a court of admiralty, jurisdiction of the present case. Unquestionably, the seizure in this case was a seizure under a navigation law.

Parsons says, "In general, and as a definition, there seems to be no other rule than that our admiralty jurisdiction embraces all maritime contracts, torts, injuries or offenses."¹ If so, it would seem that it embraces the present case; for the offense charged is a maritime offense.

In the case of *The United States. vs. The Schooner Betsy*, 4 Cranch, 443, it was held that all seizures under the laws of impost, navigation, or trade of the United States, made on waters navigable from the sea, by vessels of ten or more tons burden, are civil causes of admiralty and maritime jurisdiction. The present is a case of seizure under our "navigation" laws made on waters navigable from the sea by vessels of more than ten tons burden.

In *Cutler vs. Rae*, 7 Howard, 729, Chief Justice Taney remarked that "the court of admiralty undoubtedly has jurisdiction in cases where the vessel or cargo is subject to a lien created by maritime law." If admiralty jurisdiction exists by reason of a lien created by maritime law, it would seem strange that it should not equally exist by reason of a lien created by an act of Congress legislating on a subject properly belonging to the admiralty powers of the national government.

"For the protection of its commerce, for the collection of its revenues, and for the enforcement of all the regulations of its police in navigable waters, the United States, like all other commercial nations, find it necessary to impose penalties and forfeitures on goods afloat and on vessels, in relation to which, the laws of trade, navigation, and revenue have been

¹ 2 Parson's Maritime Law, 508.

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violated. * * * Whenever, therefore, a penalty or forfeiture is attached to a ship or vessel, or goods on board of her, it is enforced by a seizure of the thing, and the proceeding to condemn is a suit in the district court."¹

"All seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burthen, are civil cases of admiralty and maritime jurisdiction."²

It appears to me, therefore, that in the present case, a proceeding *in rem* before this court, as a court of admiralty is entirely proper. Indeed, I think it is the only proceeding that could have been adopted, which would secure to the government the benefit of the lien created by the statute.

II. The second objection made to the libel is, that it does not sufficiently allege that the Secretary of the Treasury had prepared the synopses in question, or that the master and owner willfully neglected to apply to him for it.

The libel alleges that the master and owner "willfully, wrongfully, and unlawfully failed, neglected and refused, and unnecessarily delayed to place and keep in conspicuous places two copies of a synopsis of such of the laws of the United States, relating to the carriage of passengers and their safety on board of vessels propelled in whole or in part by steam, as had been theretofore caused to be prepared and published by the Secretary of the Treasury of the United States, for the purpose of supplying to the owners or masters of such vessels two copies of the same for every such vessel, and had been caused to be printed by said Secretary, in such convenient form that the same might have been framed under glass by said master and owner, and kept in conspicuous places in said vessel; that such printed copies of said synopsis were then and there, and long before had been for many months next

¹ Benedict's Admiralty, §301.

² Id., § 302.

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previous thereto, accessible to the owners and master of said vessel Lewellen, but the said owners and master willfully, wrongly, and unlawfully, wholly failed, neglected, and refused, during said months, and on the day and year aforesaid, to apply to said Secretary for two of said copies," &c.

The libel, as to this objection, is faultless.

III. It is insisted that the libel is defective for not averring a seizure of the steamer before the libel was filed.

As a fact, it seems that the vessel was not seized till after the filing of the libel; and it is certain that the libel contains no allegation of such a prior seizure.

It is doubtless a general rule that in order to give the court jurisdiction in cases of penalties against vessels, a seizure must precede the filing of the libel; and that consequently such seizure must be averred in it.¹ But whether this general rule is applicable to the case at bar, it is not important to decide; because the owners of the vessel have waived the objection by the execution of a delivery bond under the act of Congress.

The act of March 3, 1847, provides: "That in any case brought in the courts of the United States, exercising jurisdiction in admiralty, where a warrant of arrest or other process *in rem* shall be issued, it shall be the duty of the marshal to stay the execution of such process, or to discharge the property arrested if the same has been levied, on receiving from the claimant of the same a bond or stipulation in double the amount claimed by the libellant, with sufficient surety to be approved by the judge of said court, or, in his absence, by the collector of the port, conditioned to abide and answer the decree of the court in such cause; and such bond or stipulation shall be returned to the said court, and judgment on the same, both against the principal and sureties,

¹ Conkling's Treatise, 592; Benedict's Admiralty, 1 301.

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may be recovered at the time of rendering the decree in the original case."¹

In pursuance of said act, the claimants executed a bond on the 6th of December, 1867; and the same was filed in this court on the 9th of January following.

By the filing of the bond here, it undoubtedly became a part of the record in this cause. Some doubt, indeed, may exist whether in deciding this demurrer, I can look to the bond at all. It is a general rule that "a demurrer searches the whole record;" but it is not very clear that this rule in general, goes any further than to embrace the whole pleading in the case. I am inclined, however, to extend it to the bond in question, for by the provision of the act just cited, if the government should succeed in this action, judgment would be rendered in this very bond, as the foundation of the adjudication. The bond, I think, must, therefore, in some sort, stand as in the nature of a pleading—at least so far as a demurrer and final judgment are concerned.

The objection to the libel relating to the omission of an averment of a prior seizure, is an objection to the jurisdiction of the court. And the question is, Has not the claimant, by the execution of this bond, acknowledged the jurisdiction of the court, and estopped himself now to insist on any objection to it? I am inclined to think he has. And in this view I am strongly supported by the decision of Mr. Justice Story in the case of *The Sloop Abby*, 1 Mason's U. S. Circuit Court Reports, 360. In that case, a bond had been executed, as in the present, and an objection was made to the jurisdiction for the want of a proper seizure before the libel was filed. And the judge said "if the party meant to except to the jurisdiction, he should have filed a declinatory allegation in the nature of a plea to the jurisdiction. But here he has applied to the court for, and obtained a delivery of, the property on bail; and the

¹ 9 U. S. Statutes at Large, 181

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very stipulation of bail admits the jurisdiction of the court. * * * Nor is this a mere matter of form, but a substantial and important doctrine, regulating the essential rights of the parties. If a plea to the jurisdiction had been taken in the court below, no delivery on bail would have taken place until the jurisdiction had been affirmatively settled. If the court below felt itself ousted of jurisdiction, it would have remitted the cause and the property to the District Court of Maine. But after a delivery on bail, how is that possible? The party gets possession of the property, without a trial, from the possession of a tribunal whose jurisdiction he admits as competent to bail the property; and, as soon as it is withdrawn from the grasp of the court, denies its power to institute an inquiry into the question of forfeiture. It cannot be admitted that any party can first affirm the jurisdiction, by taking the property on bail, and then turn around and deny the same jurisdiction, when the court can no longer administer effectual relief to the interests of other persons. The party is estopped by his own acts from such a proceeding." This decision is cited with approbation in Conkling's Treatise, 577, 578, (5th ed.) Its reasoning seems to me to be just; and, though that case and the present are not in all respects alike, yet I think that the reasoning applies in full force to the case at bar.

I hold, therefore, that the third objection made to the libel can not be sustained. And it seems to me that no objection urged against this libel is valid.

The demurrer is overruled at the cost of the claimant.

Afterwards, June 2, 1868, the owners of the boat, Benjamin P. Brazelton and John L. Downey, having filed a bond, their claim, and an answer by way of denial, the cause was tried on its merits. The following is the decision:

McDONALD, J.—I consider that the evidence for the prosecution in this case proves, *prima facie*, all the allegations in the libel. Indeed, it is admitted on the part of the defense

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that in point of fact, the steamer Lewellen, at the time and place mentioned in the libel, did not have on board *two* copies of the synopsis in question. It is, however, insisted in defense—and I think it is proved—that she constantly kept in a conspicuous place in her cabin one of those copies.

The evidence in defense is, that for some months prior to the first of September, 1867, this steamer was laid up for repair at Paducah, Kentucky; that immediately preceding that day her master applied to the surveyor of the port of Paducah, where she had been duly licensed and enrolled, for all proper papers and documents required by law to be used on steamers; that the surveyor thereupon furnished him with all such documents, except the copies of the synopsis of the laws mentioned in the libel; that the surveyor did not furnish him two copies of that synopsis, for the reason that he had not two such copies on hand; that thereupon the steamer, on the first day of September, 1867, set out from Paducah on a voyage to Cincinnati without two of said copies; and that on the second day thereafter, she reached the port of Evansville, having on board only one of said copies.

The counsel for the owners insist that these facts amount to a defense to this action. They argue that the acts of Congress require that the Secretary of the Treasury shall keep all the surveyors of ports supplied with copies of the synopsis in question; that the master or owner of a steamer is only bound to apply to the surveyor of the port where his steamer is enrolled and licensed for such copies; and that when he has applied to such surveyor for them and has failed to procure them, he has done his whole duty, and may proceed on his voyage without them.

I am not aware of any act of Congress that requires the Secretary of the Treasury to furnish the surveyors of ports with any copies of the synopsis under consideration. The only act on this subject of which I have any knowledge is that on which this libel is founded. The 8th section of that act provides:

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“That the Secretary of the Treasury shall cause to be prepared a synopsis of such of the laws relating to the carriage of passengers, and their safety on vessels propelled in whole or in part by steam, as he shall think expedient, and have the same printed in convenient form, to be framed under glass, and give to any such vessel two copies, on application of its owners or master.”¹

I suppose it is unimportant how the master or owner of a steamer obtains these copies, so that he actually procures them and keeps them in the proper places in his vessel. But I think it is too plain for argument, that the act above cited contemplates that on application of the master or owner to the Secretary of the Treasury, the latter shall furnish the copies. And I think it equally plain that if the master or owner cannot procure them elsewhere, he must apply for them to the Secretary of the Treasury.

I conclude, therefore, that the defense set up fails. Consequently, I find for the libellant, and assess the penalty at one hundred dollars.

Judgment for the penalty and costs.

For numerous authorities on the various questions of admiralty jurisdiction, consult *The Flora*, Vol. 2 of this series, 29; *The Celestine*, do., 1; *The Selt*, 3 do., 344.

And in the following cases it is held that the admiralty jurisdiction of the federal courts extends over the Ohio river. *The Dick Keyes*, 1, do., 408; *Seven Coal Barges*, 2 do., 297.—[Reporter.]

¹ 18 U. S. Statutes at Large, 391.

THE LEWELLEN.

DISTRICT COURT.—DISTRICT OF INDIANA.—MAY, 1868.

IN ADMIRALTY.

1. NAME ON STEAMER.—For a violation of the act of Congress of May 5, 1864, requiring steamers to have their names painted conspicuously on their wheel and pilot-houses, the proper remedy is a proceeding *in rem*.

2. PENALTY.—This act should not be interpreted as giving the same *form* of remedy as that of December 31, 1792, but only as giving the same amount of penalty.

3. PRACTICE—DELIVERY BOND.—The execution of a delivery bond under the act of March 3, 1847, is a waiver of the objection that a seizure of the vessel should precede the filing of the libel, and that no seizure had been made.

Alfred Kilgore, U. S. District Attorney, and *C. E. Marsh*,
for the United States.

Hanna & Knefler, for respondent.

This is a libel *in rem* on behalf of the United States, under the act of May 5, 1864,¹ to recover a penalty arising from a failure by the master, owner, and agents of the steamboat Lewellen to paint her name on her wheel-house.

The libel was filed September 27, 1867. A warrant of arrest was issued on it, by virtue of which the marshal seized the vessel, which was afterwards re-delivered to the owner on his execution of a bond under the provisions of the act of March 3, 1847.²

The owner appears to the suit, makes claim, and demurs to

¹ 13 U. S. Statutes at Large, 63.

² 9 U. S. Statutes at Large, 181.

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the libel on the ground that this court, as a court of admiralty, has no jurisdiction of the cause.

Whether the demurrer should be sustained must depend on the act of Congress relating to the offense charged.

The act on which the libel is founded, provides, "That every steamboat of the United States shall, in addition to having her name painted on her stern, as now required by law, also have the same conspicuously placed in distinct, plain letters of not less than six inches in length on each outerside of the pilot-house, if it has one, and (in case said boat has side-wheels) also on the outerside of each wheel-house. And if any such steamboat shall be found without having her name placed as herein required, she shall be subject to the same penalty and forfeiture as is now provided by law in the case of a vessel of the United States found without having her name and the name of the port to which she belongs painted on her stern, as required by law." ¹

This statute obviously refers us for the penalty which it creates to a prior act of Congress—the act of December 31, 1792, "concerning the registering and recording of ships or vessels." ² The 3rd section of the latter act requires that the names of all registered vessels and of the port to which they belong shall be painted on their sterns; and it provides that "If any ship or vessel of the United States shall be found without having her name and the name of the port to which she belongs painted in the manner aforesaid, the owner or owners shall forfeit fifty dollars, one-half to the person giving the information thereof, and the other half to the use of the United States." If we consider this provision of the act last named by itself, it would seem that a proceeding *in rem* would not lie on it. For it declares no lien or forfeiture against the vessel, but only provides that "the owner or owners

¹ 18 U. S. Statutes at Large, 63, 64.

² 1 U. S. Statutes at Large, 287.

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shall forfeit fifty dollars." And yet when we compare the above cited provision of the act with the language of the 29th section of the same statute,¹ and with the language of the Revenue Act,² to which the 29th section refers, it is not so clear that a proceeding *in rem* will not lie on the 3rd section of the act of December 31, 1792.

The act of May 5, 1864, first above cited, gives "the same penalty and forfeiture" as is provided by the 3rd section of the act of December 31, 1792. Yet, in one respect, the language of the two acts differs widely. The former expressly says that "the owner or owners shall forfeit fifty dollars"; and it denounces no forfeiture against the vessel. On the contrary, the latter act (on which this suit is based) provides for no penalty against the owner or owners; but it provides that "if any such steamboat" shall violate its requirements, "*she* shall be subject to the same penalty and forfeiture" declared in the 3rd section of the act of December 31, 1792. In construing these two statutes together, as we must, this remarkable difference, I think, requires that we should not interpret the act of 1864 as giving the *same form* of remedy as that of 1792, but only as giving the *same amount* of penalty. And I suppose that the reference in the act of 1864 to the act of 1792, was merely intended to fix the *sum* that should be forfeited, and not the person or thing that should incur the forfeiture, nor the mode of enforcing it.

We have seen that the act under which this prosecution was instituted, subjects no person directly to the penalty which it denounces. On the contrary, it primarily creates a penalty against the vessel itself. "*She* shall be subject," &c. Under this language, it may well be doubted whether either a personal action at common law, or a proceeding *in personam* in admiralty, would lie against the owner of this steamer. But be this at it may, it seems to me clear that the act of

¹ 1 U. S. Statutes at Large, 296, 299.

² *Id.*, 176.

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1864 meant to authorize a proceeding against the vessel itself. The act in question being a navigation law, Congress had the undoubted power to pass it. The vessel found voyaging on water navigable from the sea by vessels of more than ten tons burden, was, as to locality, within the admiralty jurisdiction. The offense charged being unquestionably an offense against the laws of commerce, is a proper subject for admiralty adjudication. The 9th section of the Judiciary Act having vested in the district courts exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, and trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, the present action would seem appropriate to the powers and functions of this court as a court of admiralty. And, in view of all this, I am not only satisfied that the present suit is a proper one of admiralty jurisdiction, but that no common law court of the country could entertain jurisdiction of it.

In support of the demurrer, it has been urged that the court has no jurisdiction of this cause, for the reason that no seizure of the vessel preceded the filing of the libel. In many cases under the revenue and navigation laws of the United States, it seems that a seizure prior to the commencement of the action is necessary to the jurisdiction of the court. But whether the present is such a case, it is not important to inquire; for the claimant has waived this objection by executing a delivery bond under the act of March 3, 1847. At the present term of the court, in another case of the United States against the steamer Lewellen,¹ we discussed this question at large. We shall, therefore, not enter into the discussion here.

It must not be understood that, in this decision, we recognize a demurrer as being the proper mode of raising objections to a libel in admiralty.

The demurrer is overruled at the cost of the claimant.

¹ See *ante* p. 156.

In re WILLIAM H. WILEY.

DISTRICT COURT.—DISTRICT OF INDIANA.—MAY, 1868.

IN BANKRUPTCY.

1. **PLEDGE.**—To render a pledge valid, the thing pledged must, in general, be delivered to the pledgee. But to this rule there are exceptions.

2. **DELIVERY WHEN NECESSARY.**—A pledge may be valid without delivery, when an actual delivery is impossible.

3. The pledge of a note, at the time in the lawful possession of a third person, may be valid without actual delivery to the pledgee. In such a case, the third person may be regarded as the agent of the pledgee, and as holding the note for him.

4. **PLEDGE, WHAT CONSTITUTES.**—A pledge or mortgage made to secure a debt, previously incurred but still subsisting, or to indemnify against a present liability arising out of a past contract, is made on a sufficient consideration.

5. **JURISDICTION—RELIEF TO PLEDGEE.**—Where the assignee has received or collected securities pledged, the court may, on petition by the pledgee, direct the assignee to apply the proceeds for the benefit of the pledgee.

McDONALD, J.—In this case, James Davis has filed a petition alleging that one John Higgins, on the 12th of April, 1867, executed a note to Wiley the bankrupt, for five hundred dollars; that to secure one Fielding Denny on a loan of one hundred and fifty dollars, about that time made by him to Wiley, Wiley pledged to Denny that note; and that it remained in Denny's hands till Wiley was adjudged a bankrupt, and till one John M. Burns was appointed his assignee, who paid off said one hundred and fifty dollars, received from Denny the five-hundred-dollar note, collected it, and now has its proceeds in his hands.

The petition further states, that on the 25th of December, 1866, Davis the petitioner became surety for the bankrupt on a note of three hundred and thirty-five dollars, executed by

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them to one Abraham Utter, which is now due and unpaid; that on the 15th of April, 1867, the bankrupt pledged to the petitioner the residue of said five-hundred-dollar note (then in the hands of said Denny) over and above said one hundred and fifty dollars for which it had been previously pledged, to secure and indemnify the petitioner as such surety as aforesaid; and that the petitioner is liable, as such surety, to pay the said note of three hundred and thirty-five dollars to said Utter.

The petition avers that all said transactions were *bona fide*; and that none of them were effected in view of the insolvency or bankruptcy of Wiley, or to violate the bankrupt law.

The petition prays that the assignee Burns be ordered to pay, the said Utter, out of the proceeds of the said five-hundred-dollar note, so as to save the petitioner from liability on his suretyship.

Burns, the assignee, appears to the petition, and admits the facts stated in it. And these facts are otherwise sufficiently proved.

It is very clear, from the facts established in this case, that the transaction between Wiley and Davis was a pledge, and not a mortgage, of the five-hundred-dollar note. But was it a valid pledge, and such a one as can be enforced in this form of proceeding?

1. To render a pledge valid, it is a general rule, that the thing pledged must be delivered.¹ This rule, however, is subject to exception. It is not necessary that the possession of the pledgee should be actual. Stocks, and, it would seem, equitable interests, though incapable of actual delivery, may be pledged.² And perhaps it may be safely asserted that, in general, when from the circumstances of the case an actual delivery is impossible, the pledge may be good without a de-

¹ 2 Kent's Commentaries, 577, 578.. Story on Bailments, §297.

² Wilson vs. Little, 2 Comstock, 443; Dykers vs. Allen, 7 Hill, (New York,) 407.

livery. In this case, Wiley could not deliver the five-hundred-dollar note to Davis, because it was then in the possession of Denny, a prior pledgee. I am inclined to think therefore, that an actual delivery of the note to Davis was not indispensable to the validity of this pledge. Besides, I think that, under all the circumstances, the possession of the note by Denny should be deemed equivalent to the possession of it by Davis to the full extent of his liability on the note to Utter. On the whole, therefore, I conclude that, so far as the delivery of the thing pledged is concerned, the pledge is valid.

2. Was there a sufficient consideration for this pledge?

A pledge is a species of contract; and for every contract there must be a sufficient consideration. Now, it is a general rule that a mere past consideration is not sufficient to support a contract. In the present case, the petitioner had, on the 25th of December, 1866, become surety for the bankrupt. Long afterwards, in April, 1867, in consideration of that suretyship, the pledge in question was given. It was then plainly given on a past consideration.

The only question, then, is, Does the rule that a mere past consideration is insufficient, reach the cases of mortgages and pledges?—for as to these there can be no difference. I am of the opinion that they constitute a remarkable exception to the rule. I suppose that a mortgage or a pledge made upon a past consideration, if there still remains a subsisting liability, is made on a sufficient consideration. We know that it is every day's practice to enforce mortgages made to secure prior subsisting debts and liabilities; and, in this respect, surely there can be no difference between a mortgage and a pledge.

Indeed, there is high authority for holding that, both in the case of a mortgage and a pledge, a past consideration is sufficient. In *Jewett vs. Warren*, 12 Massachusetts, 300, it appeared that Warren had become surety for Jewett by indorsing for him in blank. Afterwards, Jewett pledged or mortgaged divers saw-logs to Warren to indemnify him as

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such surety; and the court held that "with respect to the consideration, whatever objection might lie considering this as an absolute sale, * * * these objections vanish when the transfer is viewed as a pledge. For a liability to pay on a contract is a sufficient consideration for a mortgage or a pledge." I regard this decision in point; and, following it, I hold that the consideration, on which the pledge in question was made, is sufficient.

3. It remains to us to inquire whether the remedy prayed in this case can be granted.

The petitioner asks that the money received by the assignee, and now in his hands, arising from the five-hundred-dollar note be applied to the extinguishment of the note of three hundred and thirty-five dollars, upon which he is liable as surety.

The Bankrupt Act does not expressly provide, for such a case as this, such a remedy as the petitioner prays. By the letter of that act it is indeed provided that a surety may pay off his liability, and then prove the payment as a debt against the bankrupt's estate. Here, however, he would only take his dividend with the other creditors; and his lien would be gone.

But the petitioner occupies the place of a pledgee rather than that of a surety. And in cases of this kind, the general provision of the act is that when one has a pledge of property of the bankrupt, if as in this case, the value of the property exceeds the amount of liability for which it is pledged, the assignee may release the property to the pledgee on receiving from him such excess; or he may sell the property subject to such lien, leaving the pledgee to assert his lien as against the purchaser from the assignee.

But these provisions of the act do not reach the present case. Here the thing pledged is gone. The first pledgee has handed it over to the assignee, who has turned it into money, and has delivered over the pledged note to the maker. Under such circumstances, the proceeds of the note can only be followed into the hands of the assignee; and his right to hold

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these proceeds must depend, not on any regulations of the Bankrupt Act, but on general principles of equity.

Now it is a general principle of equity that a party interested in property may follow his interest into any new form into which it may have been changed without his fault or consent.¹ In my opinion, this rule applies to the present case. The note of five hundred dollars was an indemnifying pledge in favor of the petitioner. He has a right to insist on that indemnity. If the proceeds of it go into the general fund, that indemnity will be lost. The petitioner may well claim that those proceeds shall first go to discharge his liability to Utter as surety for Wiley.

It is therefore ordered that with said proceeds the assignee discharge and take up the note executed by Wiley and Davis to Utter; and that he hold the same to be exhibited as a voucher indicating the discharge of a lien on property of the bankrupt.

¹ Coffin *vs.* Anderson, 4 Blackford, 395.

United States *vs.* Funkhouser.

THE UNITED STATES *vs.* FUNKHOUSER & CO.

DISTRICT COURT.—DISTRICT OF INDIANA.—MAY, 1868

COMMON INFORMERS—THEIR RIGHTS.

1. The information must be given to some government official who has the power and duty to act thereupon, and if several causes exist information of any one of them is sufficient.

2. The information must be a plain statement in writing of some one substantial cause, matter, or thing, whereby a fine, penalty or forfeiture shall have been incurred. And it should be sworn to, if required by the officer.

3. A party claiming to share in the judgment must be the first informer, and his information must be substantially true, and capable of proof.

4. Whether, under any circumstances, a special agent of the revenue is entitled to claim as an informer,—*quære*.

5. The claim of an informer can only date from the time when he actually gave the proper formal information—not when he ascertained the facts.

6. The share of the informer must be taken from the net, not the gross, proceeds.

Hanna & Knefler, for Little, claimant.

J. W. Gordon, for Lamb & Chadwick, claimants.

MCDONALD, J.—This was a proceeding for the adjudication of a forfeiture of a distillery, distilling materials, machinery and apparatus, and a large quantity of whisky, the property of Funkhouser & Co., of Lafayette, for violation of the internal revenue law.

The libel was filed September 27, 1867, and on the 20th of December following, a judgment of forfeiture of the property in question was pronounced. Under this judgment, the property has since been sold; and the proceeds remain in the hands of the marshal.

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Several persons have preferred claims, as informers, to a portion of said proceeds. And the question to be decided is whether any of said claims—and, if so, which—shall be allowed.

Among the various claims preferred, there are only two which, according to the evidence, are entitled to the least consideration of the court,—that of George L. Little, and that of Charles Lamb and Rufus Chadwick. The contest is, therefore, between Little of the one part, and Lamb and Chadwick of the other.

The libel recognizes Little as the informer. It commences thus: "Alfred Kilgore, attorney," &c., "who prosecutes for the United States, as well as for George L. Little, the informer herein, exhibits this his libel," &c. And it concludes with a prayer of process against the property, and that all persons in interest be required to appear and show cause "why said forfeiture should not be decreed in manner and form as by law provided, one-half of the proceeds of sale for the use of George L. Little, the informer."

On the 15th of January, 1868; Little filed under oath what he calls "a supplemental claim and answer." In this he asserts that he is the first informer; that on the 9th of September, 1867, he proceeded to Lafayette "in the capacity of a special agent of the Treasury Department," to investigate the manner in which Funkhouser & Company carried on their business of distilling, and to ascertain whether they had violated the internal revenue laws; that he spent several days in that investigation, and ascertained all the facts on which the judgment of forfeiture was rendered; that, on the 12th of September, 1867, he embodied the result of said investigation in a report to the collector of the proper district, and promptly advised the internal revenue commissioners of said result; that, on the facts developed by said investigation alone, the seizure of the property was made, the libel filed, and the judgment of forfeiture rendered; and that Lamb and Chadwick furnished no information which led to these results.

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On the 19th of December, 1867, the day before the judgment of forfeiture, Lamb and Chadwick filed their claim. In it they allege in general terms that they are the first informers and entitled to a moiety of the proceeds; and that Little is not the first informer, and is not entitled to any of the proceeds. And they pray the court to protect their interests and to allow their claim.

On the 20th of March, 1868, Lamb and Chadwick amended their claim by alleging that they discovered the frauds out of which said forfeiture arose before the first of September, 1867, and gave information thereof to the assessor and collector of the proper district before Little made his said investigation and discoveries at Lafayette, and, before that investigation, gave to Little, in his character of a special agent of the Treasury Department, full and complete information of said frauds; and they aver that "said Little then and there undertook and faithfully promised, in consideration of said information, and the communication thereof by them to him, that he would see that their rights as informers against the said distillery of Funkhouser & Co. should be protected; and they say that, relying on said promise and undertaking * * * they took no steps to protect or secure their own rights as such informers, until they learned that said Little, in direct violation of his aforesaid promise and undertaking, had fraudulently and falsely set up a claim as informer" in the premises; and that, confiding in said promise, they were induced to give their claim no further attention till they discovered Little's said fraud on them, whereupon they immediately filed their claim.

It is understood that the district attorney takes no part in this controversy.

A great mass of testimony, in the form of depositions, has been filed by the contending claimants. This evidence, I think, establishes the following facts:

On the first of September, 1867, Little was, and has ever since continued to be, a special agent of the U. S. Treasury Department. In that capacity, he was employed at St. Louis

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early in that month. While there, he received from the Treasury Department a letter dated September 4, 1867, instructing him to proceed to Lafayette and investigate whisky frauds suspected to have been perpetrated there. He arrived at Lafayette about the 10th of December, and forthwith commenced said investigation. In a few days he discovered that Funkhouser & Co., who had carried on a distillery at Lafayette, had been guilty of divers frauds on the revenue, and had thereby forfeited said distillery and its appurtenances, with large quantities of whisky, to the government, and had defrauded the revenue to the amount of forty-nine thousand three hundred and thirty dollars. On the 12th of September, 1867, he made out a detailed written statement of said frauds and forfeitures, and delivered the same to Williams, the collector of the district in which the distillery was situate. At the same time, he telegraphed Hon. E. A. Rollins, Commissioner of Internal Revenue, of the same facts. On the information thus given by Little, the property was seized by Williams, the collector, who thereupon forwarded to the district attorney the facts so communicated to him by Little. Little also had communication with the district attorney; and the district attorney, on the information above thus obtained through Little, framed the libel on which the judgment of forfeiture was rendered. Little's discovery of any of the causes of said forfeiture could not have been made earlier than the 10th of September, 1867; and he did not, in any sense, become an informer till the 12th of that month.

About the first of September, 1867, and certainly before the 10th of that month, Lamb and Chadwick, by a joint inquiry, discovered that Funkhouser & Co. were shipping whisky in barrels from their distillery in duplicate serial numbers, in violation of the 38th section of the Internal Revenue Act of July 13, 1868, and immediately gave information thereof to Thomas W. Fry, assessor of the district, and delivered to said Fry a written statement of the serial numbers so duplicated, with the dates of the shipments. In July or August, 1867,

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Lamb and Chadwick gave like information and written statements to one G. W. Giesey, a special agent of the treasury department residing in Cincinnati, and then at Lafayette investigating these whisky frauds; but he, as it seems, made no use of the information they gave him. They also, before the 10th of September, 1867, wrote to the district attorney concerning these frauds; but they stated nothing with sufficient definiteness to enable him to act on it, and he did not act on it. About the 10th of September, 1867, while Little was making said investigation, and after he had discovered enough to effect said forfeiture, Lamb and Chadwick informed him that they knew of important facts relative thereto. He requested them to give him these facts. At first they refused. But afterwards, and before the 12th of September, 1867, they communicated to him the same facts in writing which they had, as aforesaid, given to Fry and Giesey; and Little embodied them in his said report to Williams; and these facts, as to duplicate serial numbers, were, among other causes, stated in the libel as grounds of the forfeiture aforesaid. Lamb and Chadwick both swear that they gave Little the said information in consideration that he then promised them to protect them in their rights as informers. But Little, under oath, denies this promise. The promise, I think, must be considered as proved.

The parties claim, as informers, under the 179th section of the act of July 13, 1866.¹ That section provides that a portion of the judgment in cases like the present, "shall be to the use of the person, to be ascertained by the court which shall have imposed or decreed any such fine, penalty, or forfeiture, who shall first inform of the cause, matter, or thing, whereby such fine, penalty, or forfeiture shall have been incurred."

To entitle any person to a share of the judgment as informer

¹ 14 U. S. Statutes at Large, 145.

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under this section, I think the following things are necessary:

1. The information must be given by the claimant to some officer of the government on whom the law devolves the power and duty of acting on such information. Thus, I suppose that information to the district attorney, or to the proper assessor or collector, or to a special agent of the Treasury Department charged with the duty of inquiring into the matter to which the information given relates, is sufficient so far as the person to whom it is given is concerned.

2. The information must be a plain statement of some one substantial "cause, matter, or thing whereby a fine, penalty, or forfeiture shall have been incurred."

It is certainly not sufficient to state a general suspicion or rumor of a fraud on the revenue, although such statement might lead to inquiries disclosing facts sufficient to incur the liability. Nor would a sound, positive statement that a fine, penalty or forfeiture had been incurred be sufficient without a statement of the "cause, matter or thing" for which the same was incurred.

It is probable that, as a general rule, the information ought to be written; for officers of the revenue could hardly be expected to act on verbal assertions in such a case. Indeed, it appears to be the practice in some places to require the information not only to be in writing, but to be supported by affidavit. And I would think that the revenue officer would not be bound to pay any attention to information to which the informant, if required, refused to swear. But if he was not required by the officer to swear to it, I think it would not be invalid for not being under oath.

3. If several causes exist, by either of which a fine, penalty, or forfeiture is incurred, information of any one of them properly given to the proper officer, would entitle the informer to his claim, if he is the "first" informer.

4. None but the *first* informer is entitled to any share in the judgment. And the *first* informer is he only who, in the language of the act, "shall *first* inform of the cause, matter,

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or thing whereby such fine, penalty, or forfeiture shall have been incurred."

5. The information thus first given must be true in substance and in fact; and it must be capable of proof. If it be false or if it cannot be proved to be true, it can be of no value to the government. The policy of the government is to reward the person who shall first furnish valuable information of the act of forfeiture. And if the information given be untrue or incapable of proof (which is the same thing in effect), it is of no value, and cannot, therefore, entitle the informer to a reward.

Against the claim of Mr. Little, it is insisted that whatever information he may have given, and how early soever he may have given it, his official position precludes his claim as being a common informer. The 19th section above cited gives the share to the person "who shall first inform," without excluding revenue officials or any other class of men. But it is objected that the claim of Mr. Little is precluded by the 9th section of the act of July 13, 1866,¹ amending section 5, act of June 13, 1864, in which it is declared that "any inspector or revenue agent, or any special agent appointed by the Secretary of the Treasury, who shall demand or receive any compensation, fee or reward other than such as are provided by law, for or in regard to the performance of his official duties, shall upon conviction be fined," &c. The 14th section of the act, March 3, 1865, provides for the appointment of revenue agents, "who shall be paid, in addition to the expenses necessarily incurred by them, such compensation as the Secretary of the Treasury may deem just and reasonable, not exceeding two thousand dollars per annum."

In a case very similar to the present, Judge Blatchford, of the southern district of New York, has allowed a special agent of the treasury to make claim as a common informer;

¹ 14 U. S. Statutes at Large, 101.

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though it does not appear that any objection to his right to claim was made under the acts above cited.¹ It is understood also, that in cases of forfeiture and penalties compromised before judgment, the treasury department has been in the habit of allowing assessors, collectors, and special agents of the revenue, as first informers, a share in the proceeds of the penalty or forfeiture.

In view of the acts of March 3, 1865, and July 13, 1866, above referred to, as well as of general principles and policy, I entertain great doubt whether a special agent of the revenue, who, in pursuance of instructions given him, first discovers facts working a forfeiture under the revenue laws, can by reason thereof be allowed to share in the proceeds of the thing forfeited. The act of July 13, 1866, seems to forbid it. Such agent is paid for his services, whether his investigation be successful or not, without this additional reward. It hardly seems good policy, after paying such special agent fairly for his services, to add the stimulus of a share in the spoils, thus making him a sort of speculator, and laying before him a temptation to carry things beyond just and reasonable bounds. Besides, when the special agent, by any means, discovers a "cause, matter, or thing" whereby a fine, penalty, or forfeiture has been incurred, has not the government at that moment, in legal contemplation, information of the fact? Is not the knowledge or information in the mind of the special agent identical with knowledge or information on the part of the government? If, at that moment the government can be said to be informed, how can the special agent be said first to inform? Is he entitled to the share because he informs himself? Will he be so entitled because, after he has made the discovery and the government has by consequence already received the information, he communicates the fact to some other revenue officer or to the district

¹ Internal Revenue Record, of November 23, 1867, p. 179.

attorney? Can an informer be rewarded in any case where he gives information to the government after it is in possession of that information?

I know that there are cases in which acts of Congress have expressly allowed revenue officers to share as informers. But in regard to frauds of the kind now under consideration, I am not aware of any act expressly making such provision. Nevertheless, as the usage appears to be so, and as this case may well be decided on other grounds, I make no decision on the point whether Mr. Little's claim is precluded merely because he is a special revenue agent.

It is urged by Mr. Little that the claim of Lamb and Chadwick cannot be allowed, because they are too late in preferring it.

We have seen that these gentlemen did not bring their claim to the notice of the court till the day before the final judgment was rendered, and then, not by asking to be made parties to the original proceeding, but by a petition to be allowed to share in the proceeds of the forfeiture.

In support of this objection, we are referred to the case of *Francis vs. The United States*, 5 Wallace, 338. In that case, the proceeding was under the act of August 6, 1861.¹ The 3rd section of that act provides that "the Attorney-General, or any district attorney of the United States * * * may institute proceedings of condemnation; *and in such case they shall be wholly for the benefit of the United States.* Or any person may file an information with such attorney, in which case, the proceeding shall be for the use of such informant and the United States in equal parts." In that case it was held that, under this provision, the informer must become a party to the proceeding in its inception, else the proceeding would "be *wholly* for the benefit of the United States." This

¹ 12 U. S. Statutes at Large, 319.

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was the necessary result of the words of that act. It made no provision concerning a *first* informer. It contemplates no controversy between different informers. And it provides that unless the information be filed with the attorney for the government, the proceeding shall be *wholly* for the benefit of the United States. No such provisions are found in the acts under which the present proceedings were had. As we have already seen, these only provide that the first informer—"to be ascertained by the court"—shall be entitled to share in the proceeds. I think, therefore, that the case in 5 Wallace is inapplicable to the point under consideration.

It is true that, since, in these cases, informers are liable for costs when the prosecution fails, it would be right to require them to become parties to the proceedings at an early stage. But I do not think that they are bound to be named in the libel. If so, there could be no such contention and decision between different informers, as seems to be contemplated by the 179th section of the act of July 13, 1866. For in that case, the person named in the libel must be taken to be the first informer, and no other person could contest the right with him.

Though Lamb and Chadwick came late into the case, I think they are not thereby precluded, especially as they seem to have been prevented from coming earlier by the promise of Little to protect their interests.

The only remaining question is, Who "*first* informed of the cause, matter, or thing whereby" the forfeiture in question was incurred?

That Little, on the 12th of September, 1867, gave to Williams, the collector, the information on which the prosecution proceeded, and on which the judgment was pronounced, there can be no doubt. That he never at any earlier date, informed of the facts to any one, is equally certain. Nor can it be claimed that the mere ascertainment by him of the facts on which the forfeiture was adjudged, amounted to an information within the meaning of the act of Congress. We must therefore

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consider him as having informed on the 12th of September, 1867, and not before.

Now, did Lamb and Chadwick, within the meaning of said act, inform before the 12th of September, 1867? It is certain that whatever information they gave was given before that date; and that prior to that time they informed Giezey, a special revenue agent, Fry, assessor of the district, and Little, another special agent of the revenue, in writing, of facts concerning said forfeiture. Were the facts, thus given in writing to these three revenue officials, such an information as is contemplated by the 179th section of the act of July 13, 1867? If so, they are the first informers. These facts, as we have seen, were a written statement to the effect that Funkhouser & Co. had shipped divers barrels of whisky in duplicate serial numbers in fraud of the revenue. The duplicate serial numbers and the dates of the shipments were stated in the writings; and the writing handed to Little was, under his directions, certified to be true by the party who took the numbers from the barrels.

Such a duplication of numbers is a violation of the 38th section of act of July 13, 1867, which requires that all casks or packages of distilled spirits manufactured in any distillery shall be numbered for the current year, beginning with number one for the first cask or package inspected on or after the first day of January; and that no two or more casks shall be marked with the same number.

This prosecution was founded on the 25th section of the act of March 2, 1867.¹ It provides "That the owner, agent, or superintendent of any still, boiler, or other vessel used in the distillation of spirits, who shall neglect or refuse to make true and exact entry and report of the same, *or to do or cause to be done anything by law required to be done concerning distilled spirits*, shall, in addition to other fines and penalties

¹ 14 United States Statutes at Large, 438.

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now by law provided, forfeit for every such neglect or refusal all the spirits made by or for him, and all the vessels used in making the same, and the stills, boilers, and other vessels used in distillation," &c.

Thus, we see that by this provision of law, any neglect to perform any requirement of law concerning distilling, operates as a forfeiture of the whole concern. The device of the duplicate serial numbers in question was undoubtedly such a neglect; for the parties not only neglected to number serially as the law requires, but falsely numbered the casks.

This false numbering, therefore, if alone averred in the libel and proved on the trial, would of itself have as effectually worked a forfeiture to the full extent to which it was adjudged, as it and the four other causes of forfeiture therein averred actually did.

It is clear, then, that the information given by Lamb and Chadwick was such information as is contemplated by the 179th section of the act of July 13, 1866; and, to my mind, it is equally clear that Lamb and Chadwick are the first informers within the meaning of that section.

A question has been made whether the informers' share shall be taken from the gross or net proceeds. I hold that it must be from the net proceeds. All the expenses of the litigation must be ascertained and deducted from the gross sum on hand. Then the share of Lamb and Chadwick must be proportioned according to the remaining net proceeds, pursuant to the circular of the Secretary of the Treasury, of August 14, 1866. And the matter is referred to the master to ascertain the share coming to Lamb and Chadwick according to the rules above laid down, and to the provisions of said circular; and he is ordered to report the result to this court.

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DISTRICT COURT.—DISTRICT OF INDIANA.—MAY, 1868.

IN ADMIRALTY.

1. PENALTY—HOW RECOVERED.—A prosecution for a penalty under the 3rd section of the act of July 4, 1864, regulating the carriage of passengers on steamships, &c., must be by action of debt, and not a libel *in rem*.

2. REVENUE LAWS—are those laws only whose principal object is the raising of revenue, and not those under which revenue may incidentally arise.

Alfred Kilgore, U. S. District Attorney, and *C. E. Marsh*,
for the United States.

Hanna & Knefler, for defendants.

MCDONALD, J.—The libel in this case was filed by the United States on the 27th of September, 1867.

It charges that, on the 3rd of August, 1867, at Evansville, Indiana, a port of delivery, the Steamboat Nashville, being subject to enrollment and license under the laws of the United States, and engaged in navigating the Ohio river along the shores of Indiana, and carrying cabin and steerage passengers for hire, and being wholly propelled by steam, and being temporarily moored at the Indiana shore in that city, while in the regular course of a voyage on said river, violated the revenue laws of the United States, by her master and owners then and there failing and neglecting "to place or keep in any conspicuous place in said vessel a duly certified copy of the paper or document required by law to be placed and kept, and known as the Inspector's Certificate, and described as such, and defined also by sections 9 and 25 of the act of Congress entitled 'An Act to Provide for the better Security of the lives of Pas

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sengers on Board of Vessels Propelled in whole or in part by Steam, and for Other Purposes,' approved August 30, 1852, in a place where such copy of said certificate would have been most likely to be seen by the steerage passengers of said vessel."

The libel claims, that, by reason of said facts, the steamer is subject to a penalty of one hundred dollars, and is liable to be seized, summarily proceeded against, and holden for the payment of that sum. And it prays that a warrant for the arrest of the boat issue accordingly, &c.

On the filing of the libel, a warrant was issued on which the marshal seized the steamer, and held her till the owner obtained a re-delivery of her by executing a bond under the provisions of the act of March 3, 1847.¹

The owner of the boat now appears, and demurs to the libel.

In support of the demurrer it is argued that the present proceeding is fatally defective, as being a libel *in rem*, whereas it should have been an action of debt. Whether this objection is valid, must depend on the act of Congress on which the proceeding is founded.

The act on which the libel is framed is that of July 4, 1864.² The 3rd section of that act provides, "That hereafter there shall be delivered to masters or owners of vessels three copies of the inspector's certificates, directed to be given them by collectors or other chief officers of the customs by the 25th section of the act entitled 'An Act to Amend an Act entitled "An Act to Provide for the better Security of the Lives of Passengers on Board of Vessels Propelled in whole or in part by steam; and for other purposes,"' approved August 30, 1852, one of which copies shall be placed, and at all times kept, by said masters or owners, in some conspicuous place in the vessel, where it will be most likely to be discovered by

¹ 9 U. S. Statutes at Large, 181.

² 13 U. S. Statutes at Large, 890.

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steerage passengers, and the others as now provided by law; and the penalty for neglecting or refusing to place and keep up such additional copy shall be the same as is provided by the said 25th section in the other cases therein mentioned."

The 25th section referred to in the section above cited is as follows:

"That the collector or other chief officer of the customs shall retain on file all original certificates of the inspectors required by this act to be delivered to him, and shall give to the master or owner of the vessel therein named, two certified copies thereof, one of which shall be placed by such master or owner in some conspicuous place in the vessel, where it will be most likely to be observed by passengers and others, and there kept at all times; the other shall be retained by such master or owner, as evidence of the authority thereby conferred; and if any person shall receive or carry any passenger on board any such steamer not having a certified copy of the certificate of approval, as required by this act, placed and kept as aforesaid; or who shall receive or carry any gunpowder, oil of turpentine, oil of vitrol, camphene, or other explosive burning fluids, or materials which ignite by friction, as freight, on board any steamer carrying passengers, not having a certificate authorizing the same, and a certified copy thereof placed and kept as aforesaid; or who shall stow or carry any of said articles at a place or in a manner not authorized by such certificate, shall forfeit and pay for each offense one hundred dollars, *to be recovered by action of debt in any court of competent jurisdiction.*"¹

The inspectors certificate referred to in the sections above cited, is a certificate of the seaworthiness of the vessel, and by the 9th section of the act last aforesaid, is required to be annually obtained.²

If we consider the two sections above copied separately from all other legislation on the subject, I think that we must draw from them the following deductions:

First, that both of them contemplate a personal penalty and judgment, and not a judgment *in rem*. The 25th section expressly declares that the recovery shall be "by an ac-

¹ 10 U. S. Statutes at Large, 71.

² 10 U. S. Statutes at Large, 63, 64, 65.

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tion of debt." It is singular enough that the verbs—"shall forfeit and pay"—in the 25th section, have grammatically no nominative. Whether the "master or owner," or the "steamer" shall forfeit and pay, is not expressed. So, the 3rd section—the section on which this prosecution is founded—does not in terms declare who shall pay the penalty. It merely says, that "the penalty for neglecting and refusing to place and keep up such additional copy shall be the same as is provided by said 25th section." But I think it very plain that the 25th section intends that the master or owner shall incur the penalty, and not the steamer; and that the construction of the 3rd section must, in this respect, follow that of the 25th.

Secondly. By the 25th section it is perfectly clear that the action must be in debt and not *in rem*; and, as the 3rd section provides that the penalty "shall be the same as is provided by the said 25th section," I think it a fair deduction that the form of action shall also be the same. It is true that the section does not say that the *form of action* shall be the same, but only that the penalty shall be the same. But, as the 3rd section does not expressly say anything about a form of action, and as, upon general principles, where a statute creates a penalty and fixes the amount, debt will lie for it; it seems to me fair to conclude that Congress, as these two statutes are *in pari materia*, meant to give the same form of action in relation to both. I think, therefore, that, if no other act of Congress controls this question, debt will lie for penalty under consideration. For, "if a statute prohibit the doing of an act under a penalty of forfeiture * * * and do not prescribe any mode of recovery, it may be recovered in this form of action." In this case, however, taking the two sections in question together, and irrespective of any other act, I think that these sections do prescribe the action of debt. And, if so, then the rule will apply that when a statute creates a pen-

¹ 1 Chitty on Pleading, 101.

alty and prescribes a remedy, that remedy alone can be pursued.¹

It is insisted, in support of the libel, that the 8th section of the act of July 18, 1866,² authorizes an action *in rem* in the present case. That section provides, "That in any case where a vessel, or the owner, master, or manager of a vessel, shall be subject to a penalty for a violation of the revenue laws of the United States, such vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily by libel to recover such penalty, in any district court of the United States having jurisdiction of the offense."

This section is decisive of the regularity of the present proceeding, if the offense charged in the libel is "a violation of the revenue laws of the United States." But is the 3rd section of the act of July 4, 1864, a "revenue law" within the meaning of said 8th section?

The act of July 18, 1866, is undoubtedly a revenue law. But that is not the question. The question relates to the act of July 4, 1864, and especially to its 3rd section on which this libel is founded. It is certain that this 3rd section makes no provision whatever touching revenue. The act itself is entitled "An Act Further to Regulate the Carriage of Passengers in Steamships and Other Vessels." And, consisting of ten sections, it contains no provision of any kind concerning revenue. The act, indeed, refers to and amends various sections of prior acts, found in 5 U. S. Statutes at Large, 306; 10 do., 71, 715, 719. But not one of these sections relates to the United States revenue, nor do the acts in which they are found. On the contrary, all these acts concern the protection of the lives of passengers on steamers.

Bouvier, in his Law Dictionary, defines revenue to be "the income of the government arising from taxation, duties, and

¹ *Sevens vs. Evans*, 2 Burrow 1152.

² 14 U. S. Statutes at Large, 180.

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the like." "Revenue laws" within the meaning of the section above cited from the act of July 18, 1866, should, then, mean laws relating to the income of the government, arising from taxation, duties, and the like.

The 7th section of the first article of the national Constitution provides that "all bills for raising revenue shall originate in the House of Representatives." I suppose that "bills for raising revenue" are, when passed, "revenue laws" within the meaning of the 8th section of the act of July 14, 1866. It may, therefore, throw light on the question under consideration to ascertain what has been the construction of said constitutional provision. It is certain that the practical construction of this provision by Congress has been to confine its operation to bills the direct and principal object of which has been to raise revenue, and not as including bills out of which money may incidentally go into the treasury, or revenue incidentally arise.

What bills are properly 'bills for raising revenue,' in the sense of the Constitution, has been matter of some discussion. A learned commentator [Tucker] supposes, that every bill, which indirectly or consequentially may raise revenue, is, within the sense of the Constitution, a revenue bill. He therefore thinks, that the bills for establishing the post office, and the mint, and regulating the value of foreign coin, belong to this class, and ought not to have originated (as in fact they did) in the Senate. But the practical construction of the Constitution has been against this opinion. And, indeed, the history of the origin of the power, already suggested, abundantly proves, that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue. No one supposes that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the Constitution. Much less would a bill be so deemed which merely regulated the value of foreign or domestic coin, or authorized the discharge of insolvent debtors

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upon assignment of their estates to the United States, giving a priority of payment to the United States in case of insolvency, although all of them might incidentally bring revenue into the treasury.¹

Counsel for the libel argue that all acts of Congress regulating commerce, and navigation, and the carriage of passengers by water, are revenue laws, as they all, more or less, incidentally touch the interests of the United States Treasury. And so they hold that, since by an act of Congress the master or owner of a steamer must pay a certain sum of money for the inspector's certificate already alluded to, which money goes into the treasury, and since the gist of this action is the failure to put up in a certain place in the steamer Nashville a copy of that certificate; and since a part or the whole of the penalty sued for in this case will, if recovered, go into the treasury; therefore the law creating the penalty is a revenue law. But I cannot assent to this logic. I think it is too subtle. The thread of the argument is "long drawn out" and very attenuated. To me it appears that the obvious meaning and common sense of the thing is that the 8th section of the act of July 18, 1866, in employing the phrase, "revenue laws," intended those laws—and those only—which upon their face are plainly designed to raise revenue. The act on which this libel is founded was evidently not passed with any such design. Its sole design clearly was the protection of the persons and lives of steamboat and steamship passengers.

Many other questions have been raised on the argument of this demurrer. But the conclusion above arrived at renders a notice of them unnecessary. I am of opinion that the action in this case ought to have been debt; that a libel *in rem* does not lie in it; and that the libel must be quashed and the suit dismissed.

¹ Story on the Constitution, §880.

Conwell vs. White Water Valley Canal Co.

ABRAHAM CONWELL vs. THE WHITE WATER
VALLEY CANAL COMPANY, *et al.*

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY, 1868.

IN EQUITY.

1. JURISDICTION.—It is a general rule that, to give the United States courts jurisdiction of a cause, the plaintiffs and defendants must be citizens of different States. But to this rule there are several exceptions.

2. In a cause over which a national court has acquired jurisdiction solely by reason of the citizenship of the parties, if the rights and interests of third persons should become complicated with the litigation, either as to the original judgment, or any property in the custody of the court, or any abuse or misapplication of its process; and if no state court has power to guard and determine those rights and interests without a conflict of authority with the national court, the latter court will, from the necessity of the case, and to prevent a failure of justice, give such third persons a hearing without regard to their citizenship, so far as to protect their rights and interests relating to such judgment or property, and so far as to correct any abuse or misapplication of its process, and no farther. The court will not entertain jurisdiction on behalf of a citizen of the state to litigate new or original matters, or any which might be settled in a state court without interfering with the jurisdiction already attached.

G. H. Pendleton & J. W. Gordon, for complainant.

Hendricks, Hord & Hendricks, for defendants.

McDONALD, J.—This is a suit in equity. The defendants have demurred to the bill. And the question to be decided is whether the demurrer ought to be sustained.

In support of the demurrer, several objections to the bill are urged. The principal point insisted on, however, is that this court has no jurisdiction to hear and determine the cause. Our attention will be chiefly directed to this objection.

The bill states that the complainant is a citizen of Indiana;

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and that the defendants, The White Water Valley Canal Company, and The Connersville Hydraulic Company, and the White Water Valley Railroad Company, are all Indiana corporations. There are twelve other defendants to the bill; and as to their citizenship, the bill is silent.

Under these circumstances, it is obvious that our jurisdiction of this case as arising from the jurisdiction of the parties to the bill, cannot be sustained. Counsel for the complainant, indeed, admit this; but they contend that there are other facts in the case which support our jurisdiction. Whether this is so, must be determined by the allegations in the bill. It will, therefore, be necessary here to state the substance of the bill.

The bill charges that, for many years past, the complainant has been, and still is, the owner of large tracts of land lying along White Water river, in Indiana, and is thereby entitled to the use of the water of that stream, in its natural flow past and through said lands; that this right has existed in him, and in those under whom he holds, for sixty years past; that before the year 1842, the state of Indiana constructed a canal along the valley of said river past and through said lands, and, by means of feeder dams in the river, diverted the water from its natural flow through said lands and to and by certain mills thereon, of which the complainant is, and long has been, the owner; that the state constructed said canal for the purpose of navigation only, and water power to propel machinery was only an incident thereto; that the landed and riparian proprietors, among whom was the complainant, who transferred to the State the right to locate the canal on their lands respectively and to divert the water of the river as aforesaid into said canal, did so on condition that the canal should be forever used for navigation; that by the terms of those transfers, a non-user of the canal for purposes of navigation, would revert all the rights so transferred in the donors; that in the year 1842, the state transferred all its interest in said canal to the defendant, The White Water Valley Canal

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Company; that this company has long since ceased to use the canal for purposes of navigation, and now appropriate its waters solely to the purposes of propelling machinery; that all the defendants in combination have increased the height of a certain feeder dam on the river, whereby the flow of water through the complainants lands and to his mills has been much decreased as compared with its flow when the canal was used for navigation; that the defendants have entered into divers fraudulent combinations and contracts relating to the canal and its water power in order to perpetuate the wrongs complained of; and that, by reason of the premises, the defendants have lost all right to the canal, its water power, and privileges, and the same have reverted to the complainant and the other riparian proprietors on said river.

The bill further charges that after said transfer by the state, on the 2nd of February, 1855, one Henry Vallette, to whom the White Water Valley Canal Company was then largely indebted, filed his bill in equity in this court against that company, charging said indebtedness, praying that other creditors of the company might be allowed to join him in that proceeding, and asking that an account should be taken and a receiver appointed to control the concern for his benefit. The bill avers that a receiver was appointed accordingly, and an account ordered to be taken; that a final decree was rendered against the company in favor of Vallette and others including the present complainant, Abraham Conwell; that the said suit is still pending in this court; that the defendant, Hamlin, is the receiver, and has the possession of the property of the company; and that, as such receiver, he has made a fraudulent lease for the term of ninety-nine years renewable forever to the defendant, The Connersville Hydraulic Company. The bill fails to state in what respect said lease is fraudulent, or whether it was made under an order of this court.

The bill prays that said feeder dam be abated; that the defendants be enjoined from keeping it up or increasing its

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height; and that they be required to permit the water to pursue its natural channel in the river.

Thus have we attempted to state as much of the bill, as will throw any light on the question of jurisdiction. To attempt more would be a serious labor; as the bill fills thirty-six printed pages.

Under this state of facts, the question is, can this court take jurisdiction of the case without regard to the citizenship of the parties?

In most cases in this court, the jurisdiction depends on the citizenship of the parties. The reason of this is, that the second section of the third article of the National Constitution, and the eleventh section of Judiciary Act, give to this court jurisdiction of suits between citizens of different states. And it follows that, in all cases falling within these provisions, the pleadings must show that the plaintiff and defendant are citizens of different states. And, though most of the suits in this court must be subject to this general rule, yet there are many exceptions to it. Thus in revenue cases, and copy-right and patent-right cases, and in many others the jurisdiction depends on the subject matter of the suit, and not on the citizenship of the parties.

So, too, in many instances where the jurisdiction originally depends on the citizenship of the parties, if the proceedings happen to affect the interests of other persons not original parties, the latter may often be brought before the court and made parties irrespective of their citizenship. Thus for example, if a judgment be rendered in this court between parties whose citizenship gave the jurisdiction, and if any circumstances afterwards arise entitling some third party to have such judgment modified or enjoined, he may, in many instances, maintain a bill for that purpose in this court without reference to his citizenship. This rule arises from the necessity of the case, and to prevent a failure of justice. For, since when a court has once obtained jurisdiction of a cause, it cannot suffer any other court to disturb its proceedings or interfere

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with property in its custody, a party aggrieved, if he could not be heard in the court where the judgment was rendered or in which the property is held, would be without redress.

This rule is illustrated by the case of the *Ohio and Mississippi R. R. Co. vs. Fitch*, 20 Indiana, 499. In that case the railroad was in the hands of a receiver appointed by this court. Fitch had obtained a judgment in a state court against the company; and he attempted to procure its satisfaction by a process of garnishment against the receiver in the court which rendered his judgment. And it was held that this could not be done; and that his only remedy was to apply to this court either for leave to sue the receiver, or for an order on the receiver to pay the judgment. Thus, as he had no remedy in a state court, he could apply for redress in this court, irrespective of his citizenship.

So, in the case of *Freeman vs. Howe*, 24 Howard, 450, it was held that where, by virtue of mesne process of attachment issued out of a national court, the marshal levied on property not subject to the attachment, but belonging to a stranger, the stranger could not maintain replevin for the property in a state court, but must seek redress in the court which issued the process, without regard to the citizenship of the parties.

In the recent case of *The Minnesota Railroad Company vs. The St. Paul Railroad Company*, 2 Wallace, 609, it was held that when a bill in equity is necessary to have a construction of the orders, decrees, and acts of a United States court, the bill is properly filed in such court, as distinguished from any state court; and that it may be entertained in such national court, even though the parties filing it would not, for want of proper citizenship, be entitled to proceed by original bill of any kind in a court of the United States. That was a case in which, like the present, the property in question was in the hands of a receiver appointed by a national court. And Mr. Justice Miller, in delivering the opinion, said, "that, in contemplation of law, this property is still in the hands of the receiver of the court. If in the hands of a receiver of the cir-

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cuit court, nothing can be plainer than that any litigation for its possession must take place in that court, without regard to the citizenship of the parties. * * * The question is not whether the proceeding is supplemental and ancillary or is independent and original, in the sense of the rules of equity pleading; but whether it is supplemental and ancillary or is to be considered entirely new and original, in the sense which this court has sanctioned, with reference to the line which divides the jurisdiction of the federal courts from that of the state courts. No one, for instance would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet this court has decided many times that when a bill is filed in the circuit court to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so, that the court will proceed in the injunction suit without actual service of the subpoena on the defendant, and though he be a citizen of another state, if he was a party to the judgment at law."

From the decisions above referred to and several others made by the courts of the United States, we venture to deduce the following general rule:

In a cause over which a national court has acquired jurisdiction solely by reason of the citizenship of the parties, if the rights and interests of third persons should become complicated with the litigation, either as to the original judgment, or any property in the custody of the court, or any abuse or misapplication of its process; and if no state court has power to guard and determine those rights and interests without a conflict of authority with the national court; the latter court will, from the necessity of the case, and to prevent a failure of justice, give such third persons a hearing irrespective of their citizenship, so far as to protect their rights and interests relating to such judgment or property, and as to correct any abuse or misapplication of its process, and no farther.

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Now the question is, does the case at bar fall within this rule? If so, we have jurisdiction of it; otherwise, not.

So far as the question of jurisdiction is concerned, the substance of the case made by the bill is, that this court undoubtedly had jurisdiction of the original case of Vallette against The White Water Valley Canal Company, by reason of the citizenship of the parties; that this court now has the legal custody of said canal and its appurtenances, including the feeder dam in question; that the right to maintain the canal and the feeder dam, and to divert the water from the complainant's lands and mills, has been forfeited; that the complainant has now the right to the natural flow of the water in the stream past his lands and mills; and that this court ought, therefore, to abate said dam, and to restrain all the defendants (including the receiver) from any longer diverting the water from its natural flow in the river.

On the case thus made on paper, several points are suggested:

First. It is certain that no state court can interfere with the possession of the property in the custody of this court.

Second. It is equally certain that any attempt, on the part of the complainant, Conwell, to exercise the acknowledged common law right of peaceably abating a nuisance, would, if exerted on the feeder dam in question while the same is in the custody of this court, be a contempt of its authority which might be followed by severe punishment.

Third. It is also clear that the bill proposes, not only to enforce the protection of rights and interests relating to the property in the custody of the court, but it proposes, as an indispensable prerequisite to the enforcement of those rights and interests, to litigate a new and important question—one not involved in the original suit between Vallette and The White Water Valley Canal Company—namely, whether the right to divert water from its natural flow in the stream for use of the canal, has not been forfeited by the perversion of the canal from the purposes of navigation to those of machinery

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Fourth. It is furthermore certain that the bill proposes to confine the litigation of this new and important question, not to the original parties to the bill filed by Vallette, but chiefly, if not wholly, to the new parties introduced by Conwell's bill, all of whom—complainant and defendants—are citizens of Indiana; or, at least, none of whom appear to be "citizens of different states."

Fifth. It is evident that without litigation of this new and important question of forfeiture, and without a decision of it in favor of the complainant, there is nothing stated in the bill on which any relief could be decreed.

And upon all these points, it seems to us that there is no difficulty touching the question of jurisdiction, except upon that relating to the forfeiture.

None of the cases to which we have referred—none which we have found in the adjudication of the United States courts—go the length of holding jurisdiction of a question like this.

On the contrary, the case of *Dunn vs. Clarke*, 8 Peters, 1, is strongly against the jurisdiction in the case at bar. In that case, Graham, a citizen of Virginia, had recovered against Clarke and others, a judgment in ejectment, in the United States Circuit Court for the district of Ohio. The defendants to the ejectment suit were citizens of Ohio. Graham afterwards died, and Dunn, a citizen of Ohio, became his executor. Subsequently, Clarke and his co-defendants filed a bill in equity in the same court against Dunn, to obtain a decree for the conveyance of the land in controversy, and praying an injunction of the judgment in ejectment. All the parties to this bill were citizens of Ohio, and it became a question whether the court had jurisdiction of the case. In the opinion delivered on the question it is said: "No doubt is entertained by the court, that jurisdiction of the case may be sustained, so far as to stay execution on the judgment at law. * * * * * Of the action at law, the circuit court had jurisdiction; and no change in the residence or condition of the parties can take away a jurisdiction which has once

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attached. If Graham had lived, the circuit court might have issued an injunction to his judgment at law, without a personal service of process, except on his counsel; and as Dunn is his representative, the court may do the same thing as against him. The injunction bill is not considered an original bill between the same parties as at law. But if other parties are made in the bill, and different interests involved, it must be considered, to that extent at least, an original bill; and the jurisdiction of the court must depend upon the citizenship of the parties. In the present case, several persons are made defendants who were not parties to the suit at law, and no jurisdiction, as to them can be exercised by this or the circuit court. But as there appear to be matters of equity in the case which may be investigated by a state court, this court think it would be reasonable and just to stay all proceedings on the judgment, until the complainants have time to seek relief in a state court."

We are not aware that the authority of this case of *Dunn vs. Clarke* has ever been questioned. In several respects it is very analogous to the case at bar; and it is identical with it in regard to the bringing forward of new and important matter, not involved in the original cause, to be litigated between new parties, all citizens of the same state. It decides that, so far as such new matters and new parties are concerned, the bill must be deemed "entirely new and original in the sense" which the Supreme Court of the United States "has sanctioned with reference to the line which divides the jurisdiction of the federal courts from that of the state courts;" and that, so far as it is to be deemed a new and original bill, there can be no jurisdiction unless the parties are citizens of different states. In the case in 8 Peters, 1, the new matter was a claim for a specific performance of an unexecuted contract for the conveyance of the land; in the present case the new matter is a claim that the right to divert the water into the canal was forfeited, and that the right to the natural flow of the water in the river has reverted to the complainant. In that case,

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several new parties were brought before the court; in the present case there are fifteen defendants to the new bill, only two of whom were parties to the original suit. In the former case it was proposed to obtain an injunction of a judgment at law, which, having been the very matter and result of the original litigation, was in no sense new matter, and was therefore temporarily enjoined; but in the present case it is proposed to enjoin the maintenance of a feeder dam, a thing, which, so far as appears, was neither directly nor indirectly involved in the original litigation. In that case, the court denied all jurisdiction over the question of a conveyance of the land in controversy; and if, in the question before us, we feel bound by the authority of that case, we must decline all jurisdiction to hear and determine whether the forfeiture mentioned in the bill has been incurred, and what consequences would legally follow.

Indeed the present is a stronger case against the jurisdiction of the court, than was that of *Dunn vs. Clarke*.

It may, however be urged that, in the last-named case, the parties had a complete remedy for a specific performance by way of a conveyance of the land in controversy, in a suit in a state court; and that here, according to the case above cited from 20 Indiana, 499, the complainant can have no remedy in any of the Indiana courts. To the truth of this latter assertion we cannot assent. In the case in 20th Indiana, the court suggest that the party aggrieved might obtain, from the national court in which the original suit was pending, leave to sue the receiver in a state court, and might then sue in a state court accordingly. In the present case, if the complainant had leave to sue the receiver in a state court, it is pretty clear that he could join all the other defendants in such suit without any leave from us.

But as there may be some doubt concerning the wisdom of said suggestion of the supreme court of Indiana, we are disposed to put the reason of our decision on another ground, namely, that we see no difficulty in the way of testing in a

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state court, the principal questions raised in this bill. It is true that no state court, would be justified in disturbing the receiver's possession of the canal property while the original suit of Vallette against the White Water Canal Company is pending. But that possession, as a matter of litigation, is merely incidental to the main matters presented by this bill for adjudication. Those main matters, we repeat, are the questions whether there has been a transfer by the complainant of the right to use water in the canal, on condition that it be used for navigable purposes; whether that condition has been broken; and whether the right to the natural flow of the water past the lands and mills of the complainant has consequently vested in him. Let these questions be settled and the question of the possession by the receiver will be one of little moment. And can there be any doubt that these questions may all be settled by a state court, without interfering with the jurisdiction of this court over the original case of *Vallette vs. The White Water Valley Canal Company*? A complaint under the Indiana code of procedure to establish the complainant's rights under the alleged forfeiture, filed against the principal defendants to the present bill, would fully present all these questions; and a decree settling the question of those rights, and operating *in personam*, would not, so far as we can see, interfere at all with our jurisdiction, and would, it is presumed, be respected by this court, so far as it should become our business to take any notice of them. Even should a state court in such a proceeding finally deem that the water in question ought no longer to be drawn into the canal, but, on the contrary, be permitted to take its natural course along the river, past Mr. Conwell's farms and mills, this court, on that fact being duly brought to its attention, would no doubt pursue such a course as to avoid all collision with the state courts, and would lend its aid to the promotion of justice between all the parties interested.

Thus, while we deny that, so long as the original litigation is pending, any state court could operate on the possession of

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the property in the hands of the receiver or even make an order to abate the feeder dam or restrain repairs on it, we do not hesitate to say that a state court might, without interfering with this court, try the question of forfeiture and settle all the rights of the complainant set forth in this bill.

Mr. Justice Davis, of the Supreme Court concurs with me in this opinion.

The bill is dismissed for want of jurisdiction.

SEBASTIAN BARTH vs. JOHN MAKEEVER, *et al.*

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY, 1868.

IN EQUITY.

1. LIEN OF JUDGMENT—MARSHALLING OF ASSETS.—A judgment rendered in the Circuit Court of the United States for the District of Indiana, is a lien from its date on all the lands of the defendant situated within the district. And if, after its rendition, the defendant acquires other lands in the State, the lien of such judgment instantly attaches on these lands also; and a sale of them by the defendant, made before execution issues on the judgment, does not divest the lien. And, in such a case, the purchaser of the subsequently acquired land cannot, as against a prior purchaser of the land on which the judgment became lien at the moment of its rendition, insist that the officer shall first levy on and sell the lands held by such prior purchaser before the subsequently acquired lands shall be levied on and sold.

2. JURISDICTION—CONFLICT OF AUTHORITY.—In a cause over which a national court has original jurisdiction solely by reason of the citizenship of the parties, if the rights and interests of third persons should become complicated with the litigation, either as to the original judgment, or any property in the custody of the court, or any abuse or misapplication of its process, and if no state court has power to determine and guard those rights

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and interests without a conflict of authority with the national court, the latter court will, from the necessity of the case, and to prevent a failure of justice, give such third persons a hearing irrespective of their citizenship, so far as to protect their rights and interests relating to such judgment or property and to correct any abuse or misapplication of its process, and no farther.

8. A bill is defective which does not give the full names of all the parties to whom it refers.

Barbour & Jacobs, for complainant.

Wm. Henderson, for defendants.

McDONALD, J.—This is a bill in equity, filed by Sebastian Barth against John Makeever, Daniel S. Makeever, Ephriam Sayers, Thomas J. Sayers, Thomas Clark, Henry G. Ely, Edward E. Bowen, William H. McConnell, Ingram Little, Abraham Trounstone, Joseph Trounstone, and Charles Keiffer.

The defendant, John Makeever, has filed a disclaimer. The defendants, Daniel S. Makeever, Ephriam Sayers, and Thomas J. Sayers, have demurred to the bill. The other defendants have not yet entered an appearance.

The point now to be decided is whether the demurrer ought to be sustained.

Two points are made in support of the demurrer: *first*, that this court has no jurisdiction over the parties—*second*, that there is no equity on the face of the bill. We will examine these points in their order.

I. Has this court jurisdiction over the parties to the bill?

The bill alleges that, on the 26th of June, 1858, said "Ely, *et al*," recovered in this court two judgments against said Clark—one for \$771.90—the other for \$760.24; that on the 20th of May, 1860, one "Day and Matlock" recovered in this court a judgment against said Clark for \$2278.86; that on the 22nd of November, 1860, said "Abraham Trounstone, *et al*," recovered in this court a judgment against said Clark for \$1538.75; and that these judgments, from their dates respectively, were, and continue to be, liens on divers tracts of land situate in

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Jasper and Newton counties, Indiana, abundantly sufficient to satisfy said judgments, and then, and long afterwards, the property of Clark.

The bill avers that Clark, on the 3rd of May, 1861, became the owner by purchase of a tract of fifteen acres of land in Marion county, Indiana; and that he sold and conveyed the same, for valuable consideration, to the complainant, Barth, on the 4th of July, 1861.

The bill further alleges that, on the 9th of January, 1861, "Trounstine, *et al.*," took out execution on their said judgment, and the same was returned replevied by "Wm. C. Pierce and M. P. Carr," as Clark's sureties; that on the 26th of June, 1861, another execution was issued on the same judgment which the marshal levied on several of said tracts of land in Jasper county, and returned the same not sold for want of bidders; that, on the 8th of December, 1863, a *venditioni exponas* was issued on the same judgment, and was returned "unsatisfied without a sale, having ascertained that Thomas Clark was and is not the owner of the land"; that, on the 16th of June, 1864, another *feri facias* was issued on the same judgment, was levied on divers of said tracts of land in Jasper county, and was returned not sold; and that, on the 6th of February, 1865, another *venditioni exponas* was issued on the same judgment, and the return on it showed a sale of one of the parcels of land in Jasper county for \$33.

The bill further states that, on the 26th of April, 1865, "Trounstine, *et al.*," assigned their said judgment to the defendants, John Makeever, Daniel S. Makeever, and Ephraim Sayers; that, about the same time, said Ely assigned his said two judgments to said Ingram Little; and that thereupon all said assignees of said judgments, in consideration of \$65. released the liens of said assigned judgments on a large portion of the land which had been levied on as aforesaid. But the bill does not state to whom the release was executed.

The bill, also, avers that in May, 1865, on the petition of John Makeever, Daniel S. Makeever, and Ephraim Sayers,

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this court set aside all said levies, except that on one tract of land.

The bill also avers that, on the 10th of June, 1865, another *fiery facias* was issued on the judgment in favor of "Troun-
stine, *et al.*," to the marshal, who, at the same time, had in his hands two other executions on the two judgments rendered in favor of said Ely as above stated; and that by virtue of those three executions, the marshal levied on Barth's fifteen acres of land, and sold the same for \$1150, to the said Ephraim Sayers, Thomas J. Sayers, and Daniel S. Makeever. But whether the marshal conveyed to them the land pursuant to this sale, is not stated in the bill.

The bill also charges that after the rendition of said judgments and before the said conveyance by Clark to Barth, the said John Makeever, Daniel S. Makeever, Ephraim Sayers, and Thomas J. Sayers became respectively owners by purchase from Clark of large portions of the lands, the levy on which had been set aside as aforesaid, of sufficient value to pay all said judgments; and that the obtaining of the execution of said release, and the procuring of said setting aside of levies, and the said levy on and sale of Barth's land, were effected by them in fraud of Barth's rights, and were fraudulently intended by them to screen their own lands aforesaid from liability to said judgments and wrongfully to subject Barth's to the payment thereof.

The object of the bill evidently is to show that the judgments in question became liens on all said lands in Jasper and Newton counties before they became liens on the after-acquired land of Clark which he sold to Barth; that therefore those lands ought to have been levied and sold to satisfy said judgments before resort was had to Barth's; that said order setting aside the first levy, as well as said release, was a fraud on Barth; and that consequently the levy and sale of Barth's land was, under the circumstances, an abuse of the process of this court, as well as a fraud on him.

The bill attempts to excuse the complainant's apparent neg-

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ligence in not earlier urging these objections to said proceedings, by averring that he is a man of foreign birth, and speaks and understands our language very imperfectly, and was utterly ignorant of the existence of these proceedings till within a few days before he filed his bill.

The bill prays that said levy and sale of Barth's land be set aside, and for other relief.

The bill is silent as to the citizenship of the parties.

The complainant evidently founds his claim on the suppositions, first, that the release alleged frees his lands from the lien of the judgments, at least to the extent of the value of the property released; and, secondly, that the Jasper and Newton County lands were primarily liable for the satisfaction of the judgments, and therefore the sale of Barth's land under the circumstances, was a misapplication and abuse of the process of the court. As to the release, however, as the pleadings now stand, it is entitled to no consideration, because the bill does not show to whom it was executed. But as to the second ground of the claim, namely the primary liability of the lands in Jasper and Newton counties, if, under the facts stated, the law creates such primary liability, it becomes a very serious question whether the sale of Barth's land first was not such a misapplication and abuse of our process as to give us jurisdiction to redress the wrong even as to parties over whom we could not take original jurisdiction for the want of proper citizenship.

But, under the facts stated, does the law create a primary liability against the Jasper and Newton county lands, and only a secondary liability as to the Barth land? This question must be answered by a proper construction of the Indiana statutes relating to judgment liens on lands. For the acts of Congress are construed as adopting those statutes.¹

¹ *Simpson vs. Niles*, 1 Indiana, 196; *Doe vs. Shrew*, 2 McLean, 78; *Ward vs. Chamberlain*, 2 Black, 490.

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Under the Indiana statutes, it is well settled that judgments not only bind the lands of the debtor owned by him at the rendition thereof, but also his subsequently acquired lands from the moment of their acquisition.¹

If the judgment liens had attached on all the lands in question at the same moment, and if John Makeever, Daniel S. Makeever, Ephraim Sayers, and Thomas J. Sayers had purchased a part of them from Clark before Barth made his purchase, it would be clear that Barth's land would have to go first to satisfy the judgments. For it is a rule, both as to mortgage and judgment liens, that where a debtor sells portions of the lands bound by a lien to different persons and at different times, the parcels thus sold will be liable to discharge the lien in the inverse order of such sales.² But it is insisted by the complainant that this rule is inapplicable to the present case; and he claims that another rule equally well settled does apply, namely, that when a judgment exists against a man, and after its rendition he acquires lands and sells them before any execution issues on the judgment, the purchaser takes them clear of any judgment lien. And it must be admitted that this rule is strongly supported by the cases of *Calhoun vs. Snyder*, 6 Binney, 135, and *Roads vs. Symmes*, 1 Hammond, 281. But we can hardly consider these cases as authority on the point in question; for they were made on statutes materially different from the Indiana act touching judgment liens. Indeed, upon the authorities above cited, we must regard it as settled law in this state that judgment liens attach on subsequently acquired lands at the date of their acquisition. The question whether a conveyance of such lands by the debtor before execution issues on the judgment destroys the lien, however, has not been settled here; but it is a question which seems to us to admit of very little doubt. Surely when a

¹ *Michaelis vs. Boyd*, 1 Indiana, 259.

² 4 Kent, 179, note b; *Aiken vs. Bruen*, 21 Indiana, 187.

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judgment lien once attaches on subsequently acquired land, it vests such a right in the creditor as cannot, without his act or consent, be divested by the voluntary act of the debtor conveying the land to a stranger. The circumstance, therefore, that Clark conveyed this land to Barth before the execution issued cannot help the complainant.

But it is urged in support of the bill, that as the judgment liens on the Barth land are younger than those on the other lands in question, the latter lands must be deemed primarily liable to the satisfaction of these judgments, and must, therefore, be first levied and sold for that purpose, before a seizure and sale of the Barth land. This, however, seems to us to be a mere assumption. We have found no authority in support of it. We see no good reason for it. We see no good reason why, because a judgment lien attaches on one piece of land earlier and on another later, the former must bear the whole burden till it is exhausted, before the latter shall be touched.

Now, as the bill contains no averment touching the citizenship of the parties to it, it is obvious that our jurisdiction over the parties must, irrespective of their citizenship, depend upon the subject matter of the bill. And the point insisted on as this subject matter is, that the bill shows a misapplication and abuse of the process of this court which we have jurisdiction to correct without regard to citizenship. If, indeed, the bill does show such misapplication and abuse, we should entertain no doubt of our jurisdiction. In the case of *Conwell vs. The White Water Valley Canal Company, et al.*,¹ decided at the present term, we laid down a rule on this subject to which we are disposed to adhere. It is this:

“In a cause over which a national court has acquired jurisdiction solely by reason of the citizenship of the parties, if the rights and interests of third persons should become complicated with the litigation, either as to the original judgment,

¹ *Ante* p. 195.

Barth vs. Makeever.

or any property in the custody of the court, or any abuse or misapplication of its process; and if no state court has power to determine and guard those rights and interests, without a conflict of authority with the national court; the latter court will, from the necessity of the case, and to prevent a failure of justice, give such third persons a hearing irrespective of their citizenship, so far as to protect their rights and interests relating to such judgment or property, and as to correct any abuse or misapplication of its process, and no farther."

But does this rule reach the present case? Does it appear by the bill that there has been any abuse or misapplication of our process? From what has been already said we think these questions must be answered in the negative. In our opinion, the bill, as it now stands, so far from showing that Barth's land ought not to have been first seized and sold, really indicates a state of facts bringing the case within the rule established in the case of *Aiken vs. Bruen* above cited. And, if so, Barth's land would be primarily liable to satisfy these judgments, also the other lands only secondarily liable. If this conclusion be just, Barth has no right to complain that there has been any abuse or misapplication of the process of this court.

II. In support of the demurrer, it is urged that, even if the court has jurisdiction of the parties, there is no equity on the face of the bill on which a decree could be rightly rendered in favor of the complainant.

We have already anticipated and sustained this objection to some extent. The bill, however, is defective in many other respects. It materially violates the twentieth rule in equity established by the Supreme Court. It infringes a fundamental rule of pleading by omitting to give the full names of all the persons to whom it refers. Thus it describes certain plaintiffs as "*Abraham Trounstine, et al.*," "*Henry G. Ely, et al.*," "*Day & Matlock.*" It refers to no exhibits. And, in fine, it shows the marks of haste and the want of care, to such an

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extent that any decree which we might render in favor of the complainant would, in our opinion, be erroneous.

Although, as the bill now stands, we might perhaps be justified in dismissing it, at this stage, for want of jurisdiction, as it yet may be improved by amendment stating to whom the release in question was executed, indicating whether the marshal executed a conveyance of the Barth land, giving the full christian and surnames of all the persons referred to in it, putting it in the shape required by the twentieth equity rule of the Supreme Court, and otherwise reforming it, we will, for the present, merely sustain the demurrer, and give leave to the complainant to amend. If he should not choose to amend, the bill will be dismissed for want of jurisdiction.

In re WILLIAM H. WILEY.

DISTRICT COURT.—DISTRICT OF INDIANA.—MAY, 1868.

IN BANKRUPTCY.

1. PARTNERSHIP—INDIVIDUAL DEBTS—DISTRIBUTION.—As a general rule, partnership property must first go to satisfy partnership debts, in preference to separate debts due by a partner.

2. PROPERTY TRANSFERRED TO PARTNER.—When property once belonging to a partnership, has, by a *bona fide* contract, ceased to be partnership property, and became the separate property of one of the partners, who afterward becomes a bankrupt, the partnership creditors are not entitled to any preference over the bankrupt's individual creditors, in relation to such property.

Quare, Whether in such a case, the individual creditors of the bankrupt are not entitled to the preference?

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MCDONALD J.—In this case, Samuel H. Burns has filed a petition, the object of which is to have certain property applied to the payment of partnership debts of the bankrupt.

The petition is sworn to; and the case made by it is as follows:

In 1866, and up to the 25th of October of that year, Burns and the bankrupt were in partnership in the saw-mill business; and, as such partners, they contracted debts to the amount of one thousand two hundred and twenty-eight dollars and sixty-two cents, which have never been paid. On that day they dissolved their partnership. The terms of their dissolution appear in a written agreement, a copy of which is filed with the petition. By that agreement Burns sold to Wiley all the partnership property for seven hundred and fifty dollars; and in consideration thereof, Wiley engaged to pay all the partnership debts.

On the 9th of August, 1867, Wiley was adjudged a bankrupt by this court. In his schedule, he included the said partnership debts and said partnership property, consisting of a saw-mill and its appurtenances. These have been sold for one thousand two hundred dollars, by his assignee, in whose hands the money now is for distribution. The debts proved in the bankruptcy proceeding include divers individual debts owing by Wiley, as well as said one thousand two hundred and twenty-eight dollars and sixty-two cents of partnership debts.

The petition claims that, under these circumstances, Burns has a legal and equitable right to have the proceeds of said partnership property applied to the payment of said partnership debts; and he prays for an order of the court to that effect.

In this case, if Burns has any such rights as he insists on, I think it clear that he could only have them enforced by a bill in chancery. But waiving this objection to the form of proceeding, has Burns any such right as he claims?

It appears to me plain enough that the saw-mill and its

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appurtenances have not been partnership property at any time since the 25th of October, 1866. And, in that view it should seem strange that the proceeds of their sale made since August 9th, 1867, ought to take the course in the distribution which by law partnership assets must take.

It is well settled that where a partner is liable for partnership debts, and at the same time owes individual debts, the partnership debts must first be paid out of the partnership property, and the individual debts out of the individual property of the debtor.¹ But how can this rule apply to the point in question, so as to favor Burns, unless the saw-mill with its appurtenances was, at the time of the adjudication of bankruptcy, partnership property?

Counsel for the petitioner have referred, in support of their case, to the cases *Deveau vs. Fowler*, 2 Paige's Chancery, 400; *Topliff vs. Vail*, Harrington's Chancery, 340; and *Wildes vs. Chapman*, 4 Edward's Chancery, 669. These cases all seem to proceed on the authority of a decision of Chancellor Jones, made in June, 1827—a decision, I believe, not in print. The only authority for its authenticity is a reporter's note; and what the decision was, is therefore, not very certain. The reasoning of the cases above named does not seem to me conclusive; and I should be loth to adopt it. If even, however, it is right, the cases are not precisely like the present. In all three of them a fraud is directly charged on the partner purchasing out his co-partner; and in one of them he had expressly promised to apply the partnership property purchased by him to the payment of the partnership debts. But in the case at bar there is no charge of fraud against any one; and there was no promise by Wiley to pay the partnership liabilities with the partnership property. In no view of these cases, therefore, do I feel bound to apply the principle decided by them to the case under consideration.

¹ *McCullogh vs. Dashiell's Administrator*, 1 Harris and Gill, 96; 1 S. C. American Leading Cases, 457, 469, etc.

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There are several English cases that seem strongly opposed to the claim of the petitioner. *Ex parte Ruffin*, 6 Vesey, 119, is, so far as I can see, a case exactly like the present. One partner had purchased all the effects of the firm from his co-partner, and had promised the latter to pay all partnership debts. Afterwards he became bankrupt; and thereupon it was urged that the partnership effects ought first to go to pay the partnership debts. The Chancellor decided that, as the transaction between the partners was *bona fide*, the property in question ceased to be partnership property at the moment of its sale to the purchasing partner; that thenceforth it became and was his individual property, and primarily liable for the payment of his individual debts; and that his promise to pay the partnership debts created a merely personal liability to the promisee, and could not operate as any kind of lien on said property. *Ex parte Fell*, 10 Vesey, 347; and *Ex parte Williams*, 11 do., 3, are decisions to the same effect. They appear to be well considered, and I am disposed to follow them. It is said, indeed, by Chancellor Walworth, in the case of *Deveau vs. Fowler*, *supra*, that "several questions of this kind have recently arisen in *England*. But as the decisions appear to have turned on the construction of a particular provision in the bankrupt law giving the property to the creditors of such person as should be the visible owner, I do not consider it necessary to notice them particularly." The English cases cited above did not "turn on the construction of a particular provision of" the English bankrupt law. The provision alluded to is found in the act of Jac. 1, c. 19 §11., which reciting "that it often falls out, that many persons before they become bankrupt, convey their goods to other men upon good consideration, yet still keep the same, and are reputed the owners thereof, and dispose of the same as their own," enacts "That if any person, at such time he shall become a bankrupt, shall, by the consent and permission of the true owner and proprietary, have in his possession, order, and disposition, any goods or chattels, whereof he shall

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be reputed owner, and take upon him the sale, alteration, or disposition, as owner, the commissioner shall have power to dispose and sell the same for the benefit of the creditors seeking relief under the commission, as fully as any other part of the estate of the bankrupt." The sole object of this statute evidently was to render sales by an insolvent debtor of goods and chattels, not accompanied by the delivery of possession, conclusive evidence of fraud as to his creditors—in other words to hold property found in his possession when he becomes a bankrupt absolutely liable to go into the assets, for the benefit of creditors. The statute of 27 James 1, therefore, only applies to fraudulent sales by the bankrupt, and makes the retention of possession of the goods sold conclusive evidence of fraud. But the cases above cited from Vesey's Reports were not cases of sales by the bankrupts, but sales to them. Nor was there any question of fraud touching them. It is not, then, correct to say that they "turned" on the construction of the English statute. The truth is, they turned on exactly the same considerations on which the present case must turn—namely, that a sale by a partner of his interest in the partnership property to his co-partner, divests such property of its partnership character and equities, and makes it to all intents and purposes individual property, liable to the payment of the debts of the bankrupt owner. That this should be the result may be argued (as it was in those English cases by the Lord Chancellor,) from the fact that, in cases like the present, the purchasing partner becomes the ostensible owner of all the property formerly belonging to the firm. As such sole owner, he carries on the business previously carried on by the firm. Men deal with him as sole owner. His ostensible ownership gives him credit. And if, when upon this credit, he becomes indebted and turns bankrupt, it should be urged by his old partner that the property once belonging to the partnership ought first to go to pay old partnership debts, it may well be answered that such a course would be a fraud on the creditors of the bankrupt, who obtained his credit on

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this very property. On such reasoning as this were the cases in *Vesey* decided; and deeming it sound, I decide the present case as those were decided—against the prayer of the petitioner.

Indeed the petitioner may well deem himself fortunate, if the individual creditors of the bankrupt do not apply for an order directing that the money arising from the sale of the saw-mill and its appurtenances shall be first applied to the payment of the bankrupt's individual debts before, and in preference to the partnership debts. In view of the 36th section of our Bankrupt Law, it might be troublesome to resist such an application.

The petition is dismissed at the costs of the petitioner.

Consult *In re Bradley*, Vol. 1 of this Series, 515. *In re Knight*, Id., 518, and notes.—*Reporter*.

SETH W. SWIGGETT vs. ELISHA SEYMOUR.

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY, 1868.

PROMISSORY NOTE—INDORSEMENT—DILIGENCE.

1. ASSIGNMENT OF PROMISSORY NOTES—STATUTE OF ANN.—At common law, promissory notes could not be assigned so as to vest the legal title in the assignee. The statute of 3 and 4 Ann, which is not in force in Indiana except as to "notes payable to order or bearer in a bank in this state," altered the common law rule.

2. INDORSEMENT, LAW MERCHANT.—In this state, the negotiation of promissory notes is governed by Indiana statutes. Under these statutes, notes payable to order or bearer in a bank in this state, are governed by the law merchant. Other notes are not. And as to the latter, as a general rule, the indorsee must employ due diligence by legal proceedings to collect the note from the maker before he can maintain an action against the indorser. But, to this general rule, there are several exceptions.

3. INDORSEE OF SECURED NOTE.—A note was indorsed in the state of Indiana to a citizen of the state of Ohio, and was secured by a mortgage, executed by the maker to the indorser, on lands in the state of Wisconsin. The maker was wholly destitute of property, subject to execution. *Held*, that the indorsee might maintain an action without first suing the maker or foreclosing the mortgage.

Wm. Henderson, for plaintiff.

Gordon & March, for defendant.

McDONALD, J.—The declaration in this case contains four counts. The first, second, and third of these is on the indorsement of a note of one thousand dollars; the fourth is a common count.

All the special counts charge that the note was executed in New York and indorsed in Indiana. The defendant is sued as indorser. The note was made by Uriah Gregory and Marion Gregory. The first and second counts allege that the makers, when the note fell due were notoriously insolvent; and, in

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addition to this, the third count charges that the indorsee, when the note fell due, made diligent inquiry for the makers, and could not find them.

A special plea is filed, alleging that the note was secured by a mortgage of lands in the plea described, including several lots in Green Bay, Wisconsin, and divers tracts of land described by congressional surveys but not stating in what part of North America they lie. The plea avers that these lands are worth three thousand dollars; that the mortgage was executed by the makers of the note to the defendant; and that the plaintiff had notice of all this when the note was assigned to him, but has never attempted to obtain satisfaction of the note by enforcing the mortgage lien.

A general demurrer has been filed to this plea.

The plea is in many respects defective. But the point insisted on by the plaintiff, and which is the main one in the case, is this:

Under the Indiana statute providing that the indorsee of a note shall have his recourse on the indorser only after "having used due diligence in the premises," must the indorsee of a note secured by a mortgage on lands in another state exhaust that security before he sues the indorser?

By the common law, promissory notes are not assignable. The statute of 3 and 4 Ann made them negotiable like inland bills. And, though the substance of this statute has been re-enacted in most of the states of the Union, it has never been adopted in Indiana. In 1818, the Indiana legislature passed an act making notes assignable by indorsement, and giving the indorsee (after "having used due diligence to obtain the money") a right of action against the indorser.¹ This enactment has been substantially the law in Indiana ever since, so far as relates to notes not negotiable in banks in this state. As to the latter a subsequent act puts them on the footing of inland bills.

¹ Revised Code of 1818, 282, 283.

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Under the act of 1818, continued in force now fifty years, many adjudications have been made by the Supreme Court of Indiana; so that, from these adjudications, a system of law concerning notes has grown up, which the state courts recognize, and which is binding on this court.

These adjudications have firmly established in this state the following primary general rule with its exceptions:

The "due diligence," required by the statute as a prerequisite to recourse against the indorser of a note, is a prompt effort to collect it by a proceeding at law followed up to a return of *nulla bona* on a *feri facias* against the maker of the note.¹

To this general rule there are several exceptions. These arise from two warranties implied in every general indorsement of a note, namely that the note is valid, and that the maker is solvent. These exceptions are as follows;

1. No diligence to collect the note by a legal proceeding is required, if, at the time when suit ought otherwise to have been instituted, the maker was wholly destitute of property subject to execution. Formerly, the supreme court of Indiana employed, in this connection, the phrase "notoriously insolvent."

But, as a man may be notoriously insolvent, and yet have property out of which some part of the note might be collected the phrase was obviously inappropriate; and that court now substitutes for it the phrase, "the absence of all property, within reach of the law, applicable to the payment of any debt."²

2. Another exception to the rule requiring diligence by a suit at law, is that if, upon diligent search and inquiry the maker of the note cannot be found and his residence cannot be ascertained, the assignee may sue the assignor, without

¹ Hanna vs. Pegg, 1 Blackford, 181; Merriman vs. Maple, 2 do., 850; Bishop vs. Yeazle, 6 do., 127.

² Hardesty vs. Kinworthy, 8 Blackford, 804.

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having previously sued the maker. This exception proceeds on the maxim that *lex non cogit ad impossibilia*. And it is a very reasonable exception. For it would be unjust and even absurd to hold that an indorsee should lose his recourse for omitting to do what cannot be done.

3. If the note is not valid, as, for example, if it is a forgery, or was given without consideration, or on an illegal consideration, or if the consideration has failed, or if it is voidable for fraud, infancy, or converture, or if it has been paid before assignment—in fine, if there is any valid defense against a recovery on it, the indorsee may sue the indorser without first suing the maker.¹

4. If the indorser consents to the omission to proceed promptly in a suit at law against the maker, the prompt legal proceedings required by the general rule will be thereby waived; and the omission will not defeat the indorsee's recourse on the indorser.²

5. If, after the indorsement and before the time when a suit can be brought on the note, the maker removes out of the state, no diligence by a suit is required to fix the indorser's liability. But it is perhaps otherwise, if at the time of the indorsement the maker was known to be a resident of another state.³

I believe there is no decision in a case exactly like the present; but there are several that bear a strong analogy to it.

The case of *Cheek vs. Morton*, 2 Indiana, 321, very much resembles the one at bar. There it was held that the indor-

¹ Howell vs. Wilson, 2 Blackford, 418; Fosdick vs. Starbuck, 4 do., 417; Bernitz vs. Stratford, 22 Indiana, 820.

² Nance vs. Dunlavy, 7 Blackford, 172; Brown vs. Robbins, 1 Indiana, 82.

³ Bernitz vs. Stratford, 22 Indiana, 820; Brinker vs. Perry, 5 Littell, 195; Taylor vs. Snyder, 8 Denio R., 145, 151; Spies vs. Gilmore, 821, 1 Comstock, 821, 826.

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see of a note, given for the purchase money of land sold to the maker, and which was a lien on the land, was not bound to resort to the lien before suing the indorser. Such a lien is an equitable mortgage. And if, on such a mortgage of lands in the state, the indorsee is not bound to enforce the lien, it should seem strange that he must go out of the state to enforce a lien created by a legal mortgage. I think the general rule only requires that an ordinary proceeding at law shall be attempted by the indorsee. And I am not aware that there is any decision requiring either a resort to equitable proceedings, or to equitable assets in order to fix the liability of an indorser. In the case of *Bernitz vs. Stratford, supra*, it was held that where the maker of the note had left the state before it became due, but had left behind him property subject to execution, the indorsee was not bound to proceed in attachment against that property before suing the indorser. And the reason given is that attachment "cannot be regarded as one of the ordinary proceedings at law. It cannot be resorted to without giving a bond to pay damages, &c., and is thus attended with liabilities which might involve the party in loss which he could not hold the indorser responsible over to him for, in case the attachment should turn out to be wrongful." ¹ It appears to me that the reasons why an indorsee should not be bound to resort to a distant state to foreclose a mortgage on lands are fully as strong as those above stated against a proceeding in attachment. The foreclosure of a mortgage is a proceeding in equity, and not "one of the ordinary proceedings at law." To foreclose a mortgage in Wisconsin would not require such a bond as the Indiana code requires in attachment; but it would require a bond for costs from the plaintiff who is a citizen of Ohio; and it would probably require him to perform journeys to Wisconsin which might be attended with more trouble and expense than the

¹ 22 Indiana, 828.

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giving of an attachment bond. Besides, in the case of *Bernitz vs. Stratford*, *supra*, the property which might have been attached lay in the state of the indorsee's residence; but here the mortgaged property lies in a state remote from him.

As already stated, I deduce, from the decisions on the statute in question, the conclusion that in every case where the maker of a note, at the time when it falls due, is wholly destitute of property of his own subject to execution, the indorsee, in order to have his recourse on the indorser, is not bound to make any effort whatever to collect the note from the maker. I suppose, therefore, if the note was secured by a mortgage of property situate in the county where all the parties to the note reside, it would be very questionable whether the indorsee would be bound to proceed against the mortgaged property before suing the indorser. If the rule were otherwise, it would seem to follow that the indorsee must pursue and exhaust every security and every remedy, known to the law or available in equity, before the indorser's liability would be fixed. Suppose, for example, that a note has passed through several hands by indorsements; and the last indorsee sues the last indorser alleging that the maker has no property subject to execution; would it be a good defense to such an action, that the prior indorsers, whom by the statute the last indorsee may sue, are sureties to him for the payment of the note; that they are perfectly solvent; and that they ought first to be sued? To carry the doctrine of diligence so far would be unreasonable. Indeed, it may well be doubted whether the Supreme Court of Indiana has not carried it too far. It would have been no strained construction of the statute to have held that "due diligence" is merely such diligence as is required of the holder of commercial paper, namely a prompt demand of payment, and due notice of the failure to pay. But the decisions are otherwise; and I must follow the decisions. I am not willing, however, to go any farther on this point than the Supreme Court of Indiana has gone. And, as that court has never gone so far as to require the indorsee to pursue col-

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lateral securites and equitable remedies out of the state where the indorsement was made and where he resides, before suing the indorser, I am not willing to take the lead in support of such a doctrine. On the contrary I am satisfied that the indorsee ought not to be held to a degree of diligence so extreme and extraordinary.

The demurrer to the special plea is sustained.

In Illinois any bond bill, or other instrument in writing, is assignable, by indorsement thereon, "under the hand of such person." 3 Gross Statutes, 292, §4.

A note cannot be assigned on a separate piece of paper, so as to vest the legal title in the assignee. *Fortier vs. Darst*, 31 Illinois, 212; *Ryan vs. May*, 14 do., 49.

Formerly notes payable to a person or bearer could not be transferred or assigned by delivery only so as to authorize the holder to sue in his own name. It could only be done by writing the payee's name on the back. *Hilborn vs. Artus*, 3 Scammon, 344; *Roosa vs. Crist*, 17 Illinois, 450. This is altered by the statute of 1874, so that simple delivery is sufficient. 3 Gross Statutes, 298, §8.

To fix the indorser or assignor in Illinois, the assignee must use due diligence by the prosecution of a suit against the maker, except—1, when institution of such suit would be unavailing; 2, when the maker has absconded—resided without or left the state, when the instrument became due. 3 Gross Statutes, 298, §7. "Due diligence" is held to require institution of suit at the first term of court after the note becomes due. *Tusk vs. Cook*, Breese, 84; *Chalmers vs. Moore*, 22 Illinois, 359. If suit is not instituted when the note falls due, the holder must show that a suit against the maker would have been unavailing at any time while he holds the note. *Blades vs. Graves*, 4 Scammon, 382. Diligence requires that execution be issued on the judgment, and not ordered returned within its life, unless holding in the officer's hands would have availed nothing. *Chalmers vs. Moore*, *supra*. Execution should be issued promptly. *Rives vs. Kumler*, 27 Illinois, 291. In fine, due diligence is such as a prudent man would use in the conduct of his own affairs. *Nixon vs. Weyhrich*, 20 do., 600.

The following cases besides the above bear upon the question: *Saunders vs. O'Briant*, 2 Scammon, 369; *Schuttler vs. Piatt*, 12 Illinois, 417; *Pierce vs. Short*, 14 do., 144; *Bestor vs. Walker*, 4 Gilman, 3; *Mason vs. Burton*, 54 do., 349; *Roberts vs. Haskell*, 20 do., 59; *Curtis vs. Gorman*, 19 do., 141; *Allison vs. Smith*, 20 do., 104; *Robinson vs. Olcott*, 27 do., 184.

A remote assignor is liable to a remote assignee if due diligence, when required, has been used against the maker. *Clifford vs. Keating*, 3 Scammon, 250.

Consult also *Mott vs. Wright*, ante p. 53.—[Reporter.

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In re ROBERT DUNKERSON & Co.

DISTRICT COURT.—DISTRICT OF INDIANA.—JUNE, 1868.

IN BANKRUPTCY.

LIEN OF NATIONAL BANK ON SHARES OF STOCK—BY-LAWS.

1. **EFFECT OF BY-LAW.**—A national bank has power to make a by-law creating a lien on the stock of every stockholder for his liabilities to the bank. And such a lien is created by a by-law which provides that no transfer of the stock of the bank shall be made without the consent of the board of directors, by any stockholder who shall be liable to the bank, either as principal debtor or otherwise.

2. **TITLE OF ASSIGNEE.**—An assignee in bankruptcy has the same title to the bankrupt's estate, which the bankrupt himself had before the adjudication of bankruptcy. But an exception to this rule obtains where the bankrupt has transferred his property to defraud his creditors.

3. **RIGHTS OF BANK.**—Under the by-laws of a bank creating a lien on the stock of every stockholder for his liabilities to the bank, a stockholder, owning one hundred and thirty shares in the bank, and being indebted to the bank in \$20,000, was adjudged a bankrupt:

Held, that, under these circumstances, the bank was not bound to transfer the stock to his assignee.

Held, also, that the lien of the bank on the stock was not defeated by the adjudication of bankruptcy; that the stock should be sold, and the proceeds applied to the payment of the debt due the bank so far as the same would go; and that, for the residue of its debt, the bank might prove its claim with a view to a dividend of the assets of the bankrupt estate.

4. **BY-LAW IS A CONTRACT.**—A by-law of a bank is a contract between the stockholders; and the ordinary rules of construing contracts apply in its construction. And, if possible, it should so be construed, *ut res magis valeat, quam pereat*.

Asa Iglehart, for the bank.

A. L. Robinson, for assignee.

McDONALD, J.—This case comes before me for decision under the sixth section of the Bankrupt Law. The contending

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parties agree on the facts; and consequently the only thing to be decided is the law arising on those facts.

Dunkerson & Co. have been adjudged bankrupts by a decree of this court; and Philip C. Decker has been appointed their assignee. The contesting parties are this assignee and the Evansville National Bank, a corporation organized under the National Bank Act of June 3, 1864.¹

“The facts agreed upon are, that in January, 1865, the said Bank was duly organized, by the making of articles of association, signed by R. K. Dunkerson and others, as corporators; that said articles contain, among others, the following provisions, to wit; ‘And they (the board of directors) shall also have the power to make all by-laws that it may be proper and convenient for them to make, under said act, for the general regulation of the business of the association and the management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder, who may be liable to the association, either as principal debtor or otherwise, without the consent of the board’; that the board of directors adopted the following by-law: ‘No transfer of the stock of this bank shall be made, without the consent of the board of directors, by any stockholder who shall be liable to the bank, either as principal debtor or otherwise, and certificates of stock shall contain upon them notice of this provision;’ that prior to the bankruptcy of Dunkerson, he was the owner of one hundred and thirty shares of the capital stock of the bank, for which he held the certificates of the bank, in the usual form, with the following notice printed on their face: ‘And provided that no transfer of the stock herein certified shall be made without the consent of the board of directors, while the owner shall be liable to the bank, either as principal debtor or otherwise;’ that at the same time, and before the filing said petition in bankruptcy, the bank was, and still is, the holder and

¹ 18 U. S. Statutes at Large, 99.

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owner of a bill of exchange, which is wholly unpaid, for twenty thousand dollars, discounted at its date, upon which the firm of R. K. Dunkerson & Co., of which R. K. Dunkerson is a member, is the last indorser, and which before the filing of the petition had been dishonored, and duly protested, and notice given to Dunkerson; that Decker was duly appointed, and the register had executed and delivered to him the proper instrument of assignment under the bankruptcy act; that Dunkerson afterwards indorsed and delivered to Decker the certificates of stock, who demanded of the proper officers of the bank permission to have the stock assigned in the regular way on the corporation books, who refused, and claimed a lien upon the stock for the payment of the bill, and demanded to have the stock sold and the proceeds applied upon the bill, and the residue unpaid proven as a claim against the bankrupt's estate, but that the assignee refused to admit the lien claimed by the bank and claimed the stock as free from incumbrance, and that the board of directors never have consented to the transfer of the stock."

On these facts, the question for decision is, Has the bank such a lien on the stock in question for the payment of the said bill of exchange, as entitles it to withhold the stock from the general fund of the bankrupt's estate? And this involves two subordinate questions, namely: 1, had the board of directors of the bank due authority to adopt the by-law above cited? and, 2, if so, does this by-law, on any fair construction, create the lien insisted on by the bank? We will consider these questions.

I. Had the board of directors of the bank due authority to provide by a by-law that "no transfer of the stock of this bank shall be made without the consent of the board of directors, by any stockholder who may be liable to the bank either as principal debtor or otherwise"?

The eighth section of the act under which this bank was organized provides that "its board of directors shall have power to define and regulate by by-laws, not inconsistent with

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the provisions of this act, the manner in which its stock shall be transferred."¹

This section gives express power to make the by-law in question, unless it is "inconsistent with other provisions" of the act. Counsel for the assignee Decker have not pointed out any such inconsistency. On a careful examination of the act, I am well satisfied that no such inconsistency exists. Nothing can be more consistent with the act, and, indeed, with financial prudence and honesty, than the by-law under consideration. I should entertain no doubt of its validity, even if there were no authority in support of my view. But I am sustained in this opinion by several adjudications. The case of *Child vs. Hudson's Bay Company*, 2 Peere Williams, 207, is a decision in point. By that case, it seems that the charter of the Hudson's Bay Company, in general terms, empowered the corporators "to make by-laws for the better government of the company, and for the management and direction of their trade to Hudson's Bay. Accordingly they made a by-law, that if any of their members should be indebted to the company, his stock in the company should be in the first place liable to the debts which such member should owe the company." Afterwards a stockholder in the corporation became indebted to it, and subsequently became a bankrupt. Thereupon his assignee filed a bill against the company praying a transfer of the stock to him for the benefit of creditors. The company resisted this application on the ground that their by-law gave them a lien on the stock. The assignee objected that the corporation had no power to make the by-law. The case was almost identical with the one under consideration. And Lord Chancellor Macclesfield, in deciding it, said, "This is a good by-law; for the legal interest of all the stock is in the company, who are trustees for the several members, and may order that the dividends to be made shall be under particular restrictions or terms. And for the same reason that this by-law is objected to, the common by-laws of

¹ 18 U. S. Statutes at Large, 101.

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companies to deduct the calls out of the stocks of the members refusing to pay their calls, may be said to be void."

So, in the case of *Waln's Assignee vs. The Bank of North America*, 8 Sergeant & Rawle, 73, it was held that "a stockholder who borrows money of a bank with a full knowledge of a usage not to permit a transfer of stock while the holder is indebted to the bank, is bound by such usage; and neither he nor his assignees under a voluntary general assignment, can maintain an action against the bank for refusing to permit his stock to be transferred." Here without any by-law, a mere usage was held sufficient to create a lien on the stock of a debtor to the bank.

The cases of *The Union Bank of Georgetown vs. Laird*, 2 Wheaton, 390, and *Brent vs. The Bank of Washington*, 10 Peters, 596, favor the same view.

But it is urged by counsel for Decker, that though the by-law in question may be valid as against Dunkerson, the original stockholder, yet it is not valid as against his assignee, because he represents, as well the interests of his creditors as those of the bankrupt. The general rule is that, in bankrupt cases, the assignee possesses exactly the right—no more and no less—which the bankrupt had before the adjudication of bankruptcy. To this rule I know of but one exception, namely, that in cases where the bankrupt has fraudulently transferred his property with intent to defeat or delay his creditors, the assignee is so far the representative of the creditors that he may recover back such property, though the party making the fraudulent transfer cannot do so. The present case does not fall under this exception, but is within the general rule. If before the adjudication of bankruptcy Dunkerson could not have complained of this refusal to transfer this stock, the assignee cannot now do so.

II. Does the by-law in question, on its face, purport to create a lien on the stock of every debtor of the bank for the payment of his debt?

It is to be observed that the by-law does not in express

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terms create a lien. Can such a lien be deduced from it by fair construction? The by-law merely says that "No transfer of the stock of this bank shall be made, without the consent of the board of directors, by any stockholder who shall be liable to the bank, either as principal debtor or otherwise." This by-law with the provision on the same subject contained in the articles of association already referred to, must be considered as a contract between all the stockholders and the bank regarded as a corporation. And the rules of construing contracts are therefore applicable to this by-law.

Now, it is a fundamental rule, that contracts shall, if possible, be so construed as to make them valid to some purpose, and not void—*ut res magis valeat, quam pereat*. The by-law under consideration can have no validity whatever, and must be utterly vain and nugatory, unless it was intended to create a lien on the stock of the debtor to the bank. What else could have been intended by it? Does not the very fact that it relates to debtors to the bank and to nobody else, raise a fair presumption that it should be beneficial to the bank in relation to such indebtedness? And how could it operate beneficially, except by way of lien to secure the debt?

In the case of *Leggett vs. The Bank of Sing Sing*, 24 New York, 283, it was held that a provision in the articles of a banking association that the shares of its stock shall not be transferrable until the shareholder shall discharge all debts due by him to the association, creates a lien as against an assignee of the stock, who takes it with knowledge thereof while the shareholder is under a contingent liability as indorser. As this decision was made under the free banking law of New York, a law very similar to the act of Congress establishing national banks, and exactly like it so far as concerns the question in the present case, I deem it a strong authority in support of the view which I have above expressed. And, upon the whole, I entertain no doubt that the by-law in question, considered in connection with the provision in the articles

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of association already noticed, creates a lien on Dunkerson's stock for the debt due by him to the bank.

In pursuance of the agreement of the parties, I therefore order and decree that the said bank and assignee sell the said stock; and, in due form, transfer it to the purchaser or purchasers thereof; that the proceeds of such sale be applied first to the payment of the bill of exchange due to the bank by Dunkerson; and that the bank be allowed to make proof of the residue after such payment, with a view to a dividend for such residue out of the general fund of the estate of the bankrupt.

All which is ordered to be certified.

In the case of *Evansville National Bank vs. Metropolitan National Bank*, Vol. 2 of this Series, 527, Judge DRUMMOND held that a transfer of the stock of a banking corporation organized under the act of June 8, 1864, to a *bona fide* holder was valid, though the seller at the time was indebted to the bank, and a by-law of the bank declared that no transfer of the stock by any shareholder indebted to the bank should be made, without the consent of the board of directors; that such a by-law in effect attempted to create a lien upon stock for debts of the holder, and to accomplish the same result as if a loan were made upon the security of the stock—a transaction forbidden by the 85th section of the act.

For a full citation of authorities consult note to above case.—[Reporter

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THE J. R. HOYLE.

DISTRICT COURT.—DISTRICT OF INDIANA.—JULY, 1868.

IN ADMIRALTY.

1. JURISDICTION.—A person who in one State advances money to release a boat belonging in another state from the possession of the marshal for the former state, has a lien upon the money so advanced which he can enforce *in rem* in a court of admiralty.

2. AFFIDAVIT.—There is no rule in admiralty, in the District Court for Indiana, requiring that libels *in rem* in civil causes shall be supported by the affidavit of the libellant.

3. Libels in civil actions *in rem* need not state the occupation and residence of the libellant.

Chas. E. Marsh, for the motion.

Gordon & March, contra.

MCDONALD, J.—On the 30th of November, 1867, John H. Lee and Joseph R. Hoyle filed in this court a libel, in a cause civil and maritime, against the steamboat J. R. Hoyle.

Afterwards, under this proceeding, divers other persons—among whom were Wadkins and Raymond, and George Brose and John J. Brose—intervened, and filed libels against the same boat.

George Brose and John J. Brose now appear, and move that the libel of Wadkins and Raymond be dismissed.

Various causes for this motion have been stated; but they are all comprehended within the following: 1. That there is nothing stated in the libel to authorize the court to render any judgment in favor of Wadkins and Raymond. 2. That the libel is sworn to by the proctor, and not by either of the libellants. 3. That the occupation and residence of the libellant are not stated in the libel.

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The libel, after reciting the filing of Lee and Hoyle's libel, and the seizure of the boat under it, alleges that, at Shreveport, Louisiana, on the 2d of February, 1866, Wadkins and Raymond "loaned to the said boat the sum of five hundred dollars, for the purpose of releasing said boat from an attachment at that place, where said boat had been attached and held in custody for a debt of said sum of five hundred dollars;" that "said sum of five hundred dollars was, by said libellant, for the purpose aforesaid, paid to one W. B. Lewellen, who was then the clerk and owner of said boat; and that, at the time said sum of money was thus loaned, the libellants received from said Lewellen a receipt as follows:

"'Steamer J. R. Hoyle, Dr., W. H. Wadkins and J. Raymond \$500, borrowed, money, this Feb. 2d, 1866.

W. B. Lewellen.'"

The libel further avers, that this five hundred dollars was applied to said purpose, and that no part of it has been repaid.

There are other allegations in the libel; but it is unnecessary to state them with reference to the present motion. We will proceed to examine the objections on which the motion to dismiss the libel is founded.

I. It is insisted that there is nothing stated in the libel that would authorize the court to render any judgment in favor of the libellants.

This objection is in the nature of a demurrer, and proceeds on the supposition that the claim set up in the libel is not one of admiralty cognizance.

It is correctly said in support of this motion, that the writing copied into the libel is not a bottomry bond. It has scarcely a feature of such a bond. Indeed, it is no bond at all, for it is not sealed. But is not the transaction set out in the libel a maritime loan operating *in rem*? If so, it furnishes ground for maritime jurisdiction. "For if a master borrow money abroad for the necessities of the ship, and so apply the same, and no instrument of bottomry or hypothecation

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is given, the law merchant gives to the lender a lien on the ship for the amount, in addition to any remedy he may have at common law."¹ Such a lien, it seems, the lender would have, though nothing was expressly stipulated as to the liability of the vessel. Indeed, it is at this day a well established doctrine, that a person who lends money for the use of a ship in a foreign port has the same lien on the vessel as material men have.² Shreveport, where this loan was made, is a foreign port within this rule.³

The case of *Maitland vs. The Brig Atlantic*, 1 Newberry, 514, has been cited in support of this motion. It is my opinion that the case gives no countenance to the motion. It decides that a bottomry bond with exorbitant usury is invalid if it stipulates that the payment of it shall not depend on the fortunate issue of the voyage; and that if a master borrows money at a foreign port to repair his ship, and executes a bill of exchange for its repayment, the lender waives his lien on the vessel for the money. But that is not the present case. Here was no bottomry bond, no bill of exchange, nothing done to waive a lien. And the judge, in deciding that case, said, "It is perfectly true, * * * that the very fact that advances had been made to defray the expenses of repairs, would create a lien upon the vessel, if such advances had been made upon the credit of the vessel; and that such a lien would exist, if there had been no special act of hypothecation or mortgage. It would indeed exist by operation of law. But if instead of relying on the general principles of maritime law, the lender of the money chooses to exact of the master a special hypothecation of the vessel and cargo, and causes to be inserted in the instrument clauses which operate as a waiver of his lien, or as a forfeiture of his right to proceed in

¹ 1 Parsons' Maritime law, 408.

² Davis vs. Child, Daves, 71; The Sophie, 1 W. Robinson, 362

³ Smith vs. Hollins, 4 Wheaton, 498.

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rem., how can a court of admiralty grant him relief? If, as in the case now under consideration, he exacts maritime interest on his loan, and at the same time, expressly refused to assume maritime risks, is it not clear that the very instrument on which he relies for his security is, by the well recognized principles of maritime law, an abandonment of all claim against the vessel? It is well settled, that if a material man gives personal credit, even in the case of material furnished to a foreign ship, he loses his lien." This reasoning strongly supports the libel under consideration, in which there appears to have been no waiver of any kind.

But it is understood, that this case from Newberry is cited as applicable to the present one on the ground that the instrument copied into the libel is a personal security like the bill of exchange in the case in Newberry, and is therefore a waiver of the lien on the boat. I cannot so regard it. The instrument in question is neither a bill nor a note. It is no personal security. It is, indeed, signed by W. B. Lewellen. But it contains no promise by him. On the contrary, it plainly expresses the steamer as the debtor; and I think it must be construed rather as creating a lien on the boat, than as destroying it. It is plainly intended to show that the steamer is liable for the money borrowed; and it is extraordinary that it should be adduced to establish the extinction of that liability.

It is argued, moreover, that the libel does not allege that there was any necessity for this loan, and is therefore bad. It is certainly a general rule that the master or captain of a vessel cannot, without the owner's consent, create a lien on it for money loaned or materials furnished, unless the same are necessary in order to prosecute the ordinary business of the vessel. But this rule does not apply to the owner of it. The rule is restricted to masters and other agents on this obvious principle, that, as generally the owner does not expressly authorize the master or other person to create liens on his vessel, the agency is only implied, and it is not reasonable to

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imply such an agency unless there was a necessity for the money advanced in order to prosecute the voyage.¹ This reason does not apply where the owner obtains the loan. In that case, the lender is under no obligation to inquire whether the loan is necessary in order to the prosecution of the voyage. It is enough that the money is to be applied to the purposes of the voyage.² Now the libel in this case avers that the loan was obtained by W. B. Lewellen, "who was then the clerk and *owner* of said boat." As owner, he could create the loan whether there was any special necessity for it or not.

But I do not concede that there was not such a necessity for this loan as to justify an agent in making it and binding the boat for it. The steamer was seized under an attachment, and was in the legal custody of an officer. She could not proceed on her voyage till she was released. How long she would be delayed thereby, who could tell? This was as strong a necessity as the want of provisions, or materials, or even repairs on the boat, could be.³ The first objection to the libel, therefore, can not be sustained.

II. It is objected that the libel is sworn to by a proctor, and not by either of the libellants.

I find nothing in the rules promulgated by the Supreme Court requiring libels like the present to be sworn to. By the third and fourth rules of the court of the Southern District of New York, a libel praying an attachment *in personam* or *in rem*, or demanding the answer of any party under oath, must be sworn to by the libellant.⁴ But even these rules, if we had such here, would not reach the present case. Prof. Parsons says, "regularly, the libel should be signed by the libellant or his agent, and by a proctor of the court, and, unless brought in behalf of the government, verified by the oath of the libellant. This matter, however, is of course very dependent

¹ Smith's Mercantile Law, 411.

² 1 Parsons' Maritime Law, 410, and cases cited in note 6

³ The Aurora, 1 Wheaton, 96.

⁴ Betts' Admiralty Practice, 22, 23.

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on the practice and rules of the several district courts of this country.”¹ In *Coffins vs. Jenkin*, 3 Story, 108, that distinguished Judge says, “I observe, too, that there are some irregularities in the present case. The libel is sworn to, but not the answer. The reverse is the usual and proper practice, although there is no objection to the libel being sworn to if the libellant chooses.” From this language, I suppose that Judge Story did not consider that, as a general rule, libels must be sworn to. The seventh admiralty rule of the Supreme Court provides, that “in suits *in personam* no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court upon affidavit or other proof showing the propriety thereof.” The present case is not within this rule; and it is a fair deduction from the rule, that libels not falling within it, need not to be sworn to. The fourth rule in admiralty adopted by this court is very similar to the seventh rule of the Supreme Court. It provides that “All libels praying process of arrest, whether *in rem* or *in personam*, shall be verified by oath or affirmation of the libellant, unless for sufficient cause such oath shall be dispensed with by the special order of the Judge.” I do not think that the present case is within this rule. But even if it were, I would not sustain the motion made by G. and J. J. Brose to dismiss the libel. The rule was not made for their benefit, but for that of the owner of the boat. The want of an affidavit to the libel can do them no harm; and they have no right to complain of it. Even if the owner made this motion, I should be inclined to overrule it, and permit the affidavit now to be added.

III. It is also objected to this libel that it fails to state the occupation and residence of the libellants as required by the twenty-third rule of the Supreme Court. That rule only requires that the libel, “if *in personam*,” shall state “the names,

¹ 2 Parsons on Maritime Law, 680.

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and occupations, and places of residence of the parties." The present is a libel *in rem*, and not *in personam*. Therefore this objection is without weight.

The practice of moving to dismiss libels for defects apparent on their face, ought not to be indulged. If a libel is defective, the proper course is to file exceptions to it. If these are sustained, the court would allow the libellants to amend. But if the motion to dismiss is sustained, the cause is out of court, and no amendment can be made. Admiralty courts are very liberal in allowing amendments; and the indulgence of motions to dismiss would hardly be consistent with that liberality. If, therefore, the objections taken to this libel were well founded, I should be reluctant to sustain a motion to dismiss it—especially so, if, as in the present case, the motion is made, not by the owner of the boat, but by interveners asserting claims against the boat, and occupying the same position in the suit as the libellants Wadkins and Raymond do.

The motion to dismiss is overruled.

In re W. H. THIELL.

DISTRICT COURT.—DISTRICT OF INDIANA.—JULY, 1868.

IN BANKRUPTCY.

1. **EXEMPTIONS—PRACTICE.**—When a bankrupt applies to his assignee for the exemption of property under the 14th section of the act, and the application is refused, the proper way of bringing the matter before the district judge for his decision, is to except to the decision of the assignee.

2. **EXEMPTIONS—DISCRETIONARY.**—The exemption clause in the 14th section of the act, authorizing the assignee to set apart "other articles and necessities," vests a discretionary power in the assignee, and his action thereon ought not to be reversed unless it plainly appears that he has abused his authority.

3. Such exemptions, however, cannot include manufactured articles kept for sale.

MCDONALD, J.—This matter come before me on a certificate of a Register in Bankruptcy under the sixth section of the Bankrupt Law. The certificate states that "The assignee, Samuel C. Davis, having, under the five-hundred-dollar exemption clause, set off to the bankrupt the sum of three hundred and sixty-three dollars and fifty-three cents, which includes household and kitchen furniture, and tools of trade, with some other items, the counsel for the petitioner claims that the assignee should make up the sum of five hundred dollars out of the stock on hand of the petitioner, he being a tinner, and having been engaged in the tin and stove business, and the stock consisting of such articles as are used and sold in that business. This the assignee would be willing to do, but that he conceives the language of section fourteen leaves him no discretion. The words, 'other articles and necessities,' he holds cannot extend to articles held on sale. To this action of the assignee counsel for the petitioner objects."

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It is presumed that by the term "petitioner," in this certificate, the register means the bankrupt, though, so far as concerns the papers before me, no petition appears to have been filed.

In cases like the present the 14th section of the Bankrupt Act provides, that "the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the court." There is here no formal exception taken to the ruling of the assignee; and the case can hardly be said to be regularly before me. Nevertheless, it may be as well perhaps that I should express an opinion on the disputed point in the form in which it is presented.

So far as the question presented is concerned, the 14th section of the act provides that "there shall be excepted from the operation of this section the necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the assignee shall designate and set apart, having reference, in the amount, to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars."

I construe this provision of the act, so far as it relates to "necessary household and kitchen furniture," as being imperative on the assignee, though he must judge and determine what furniture of the kind described is, under the circumstances, necessary.

So far as concerns the phrase "other articles and necessities," in the act, I think that Congress meant to leave it to the sound discretion of every assignee in bankruptcy to determine what and how much property of this kind, over and above necessary household and kitchen furniture, and not to exceed in all five hundred dollars, ought, under the circumstances of each particular case, to be exempted from the operation of the Bankrupt Law. The term "necessaries" used in the phrase last cited, may include things other than household and kitchen furniture. It may, for example, include provisions for a family, and the tools of a tradesman, and the books of a professional man.

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The phrase "other articles" occurring in the 14th section of the act is a very indefinite expression. It might include family pictures, "keep-sakes," a cheap watch or clock, and many other things of small value; but it certainly should not be construed as including things of considerable value, used only as things of ornament or pleasure, as gold watches, pianos, and the like. Whether it may fairly be construed as including material for carrying on a trade, may be doubtful; though I think cases might exist in which a moderate quantity of such material would be fairly comprehended under the term "other articles." I am of opinion that it would not include manufactured articles kept for sale. I think, therefore, that in this case, the assignee acted properly in refusing to set off to the bankrupt the tin ware which he had on hand for sale. Whether, in refusing to allow him to retain any of the material out of which he manufactured tin ware for sale, the assignee acted with sound discretion, is not quite so clear. But he had a better opportunity, from a reference "to the family, condition, and circumstances of the bankrupt," to judge what was proper in the case, than I, who am altogether uninformed touching these matters, could have. Therefore, I cannot undertake to say that he did not exercise a sound discretion in refusing to allow the exemption prayed by the bankrupt.

According to what has been said, this authority on the part of the assignee in bankruptcy to exempt in favor of a bankrupt "other articles and necessities," is a discretionary power. Now, it is a rule that when a discretionary power is confided to an inferior officer or court, the action on such a power will not be reversed, unless it plainly appear that the discretionary power has been abused.¹ Indeed, the Supreme Court of the United States has gone further and held that the execu-

¹ *Gordon vs. Spencer*, 2 Blackford, 286; *Heberd vs. Myars*, 5 do., 94; *Tinkler vs. Palin*, 19 do., 240; *Hunter vs. Elliott*, 27 do., 93.

In re Thiell.

tion of a discretionary power cannot be reviewed in a court of errors.¹ The Bankrupt Act does, however, authorize this court to review, and, in proper cases, to revise, the action of an assignee in the exercise of the discretionary power under consideration. But in determining what this court shall do in such a case, I think the question should always be, Has the assignee plainly abused the discretionary power confided to him? And if it does not appear that he has, his action should be affirmed.

In this view of the matter, I sustain the action of the assignee.

Where the assignee wrongfully exempts in his list, household furniture, necessary articles, etc., *exceptions* must be taken to his report. *In re Elisa Gaisney*, 2 Bankruptcy Register, 168.

But in cases of exempting real estate unlawfully, no exceptions need be taken to the assignee's report, as no title passes thereby, but the creditors may except to the assignee's account, and hold him responsible for the value of the exempted property. *Id.*; *In re Farish*, *Id.*, 62; and *In re Jackson & Pearce*, *do.*, 158.—[Reporter.]

¹ Philadelphia and Trenton R. R. Co. *vs.* Stimpson, 14 Peters, 448.

In re ROBERT H. SHOEMAKER.

DISTRICT COURT.—DISTRICT OF INDIANA.—JULY, 1868.

IN BANKRUPTCY.

1. OMISSION FROM SCHEDULE—DISCHARGE.—Where a bankrupt omitted to state in his schedule the amount of money in the hands of a receiver appointed by a state court in a suit between him and his co-partner in relation to partnership property, but stated that the partnership assets would not more than pay the expense of their litigation, and that he was not able to state their exact amount: *Held*, that the omission was no ground for refusing a discharge; and that an affidavit to the truth of the schedule was not *prima facie* perjury.

2. FRAUDULENT TRANSFER.—A suit was brought by a partner against his co-partner in a state court, charging waste, and praying the appointment of a receiver. A receiver was appointed, and took control of the partnership assets. Soon after, the plaintiff in that suit was adjudged a bankrupt on his own petition. *Held*, that the proceedings in the state court did not amount to a fraudulent transfer by the bankrupt of his property, so as to preclude him from his certificate of discharge.

3. Opposition to the discharge of a bankrupt must be in writing, and must disclose the name of the opposing creditor or creditors.

Dye & Harris, for the application for discharge.

Hanna & Knefler, and *Clough & Wheat*, *contra*.

MCDONALD, J.—In this court, on the twentieth of January last, Robert H. Shoemaker was, on his own petition, adjudged a bankrupt. He now applies for a certificate of discharge. Messrs. Hanna and Knefler, representing the creditors, oppose this application.

This opposition is founded on two charges: *First*, that the bankrupt has committed perjury in the affidavit to his schedule. *Second*, that he has transferred his property to defraud his creditors. We will examine each of these charges.

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1. It is alleged that the bankrupt "willfully swore falsely in his affidavit annexed to his schedule and inventory, in this that he did not state that a certain receiver who had been appointed by a court in Kansas had in his hands four hundred and thirteen dollars and seventy-four cents belonging to the bankrupt."

In support of this charge, an authenticated copy of a judicial proceeding in the District Court of Leavenworth County, Kansas, is produced in evidence. By this transcript it appears that, on the 19th of June, 1867, the bankrupt filed his bill or petition in said court against his partner in the nursery business, C. McRay Dinsmore, charging him with wasting the partnership effects, asking for an injunction, and praying the appointment of a receiver. On this petition a receiver was appointed, who, on the 11th of November, 1867, made a report to that court, by which it appeared that he had then in his hands the balance of four hundred and thirteen dollars and seventy-four cents of said effects. It does not appear by the transcript that that court has ever made any disposition of said sum, or even that the suit in Kansas is ended.

The only references in the schedule to this four hundred and thirteen dollars and seventy-four cents, are as follows:

"On a settlement of the account of Dinsmore and Shoemaker, there will be due me large sums of money. But as Dinsmore has absconded after creating the debt mentioned in schedule A, without rendering any account, your petitioner regards the claim as worthless, and is unable to fix the amount.

"The nursery business of Dinsmore & Shoemaker was placed in the hands of M. C. Shoemaker [the receiver] in Leavenworth, Kansas. But the assets will not more than pay expenses of settlement. I am unable to state the exact amount."

This is all the evidence before me touching the charge of false swearing.

The 29th section of the Bankrupt Act provides, that no

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discharge shall be granted if the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory.

Does the evidence, as above stated, prove that the bankrupt, in his affidavit to his schedule, willfully swore falsely? Without entering largely into particulars, I may safely say that the evidence does not prove the charge. The schedules are loosely drawn. The four hundred and thirteen dollars and seventy-four cents, though obscurely alluded to, is not stated. It ought to have been stated, if known to the bankrupt. As he was a party to the suit in Kansas, he is *prima facie* presumed to have known that the four hundred and thirteen dollars and seventy-four cents was in the hands of the receiver. But as this is only a disputable presumption; and as he states that he is "unable to state the exact amount," I think this fairly rebuts the presumption. At all events, it is clear that there is not sufficient evidence in the case to fix on the bankrupt the charge of perjury.

2. It is charged that the bankrupt, in contemplation of bankruptcy, "made a transfer, assignment, and conveyance of part of his property, for the purpose of preventing the property from coming into the hands of the assignee, and of being distributed under the Bankrupt Act."

The only evidence of the fraudulent transfer here charged is found in the transcript, already referred to, of the judicial proceedings in Kansas. Counsel opposing the bankrupt's discharge insist that the appointment of a receiver on the application of the bankrupt, as shown by said transcript, amounts to such a fraudulent transfer. They argue that the appointment of the receiver vested in him the title to the partnership property, and amounted to a voluntary transfer of it within the meaning of the Bankrupt Act.

It may be that the appointment of a receiver by a court of equity vests the title to the property in dispute in him temporarily. But it seems to me an error to suppose that, even if done at the instance of a failing partner, it would be such

In re Shoemaker.

a fraudulent transfer of his property as is contemplated and provided by the Bankrupt Act. If, in June, 1867, Shoemaker found that his partner was wasting their partnership property, it was perfectly lawful for him to apply to a state court for redress, whether at that time he was insolvent or not. In doing so, the best way to put a stop to that waste would probably be to put the property into the hands of a receiver. Such a course would be likely to contribute to his own advantage and to the security of his creditors. And to argue that in doing so he committed a fraud, either on his creditors or on the Bankrupt Act, appears to me to be most unreasonable.

Moreover, there is no evidence before me indicating that, at the time when this receiver was appointed, Shoemaker either was insolvent, or contemplated insolvency or bankruptcy. For anything that appears, he may then have been worth millions. There is nothing in this objection.

If all these objections were proved, the opposition to the discharge must fail, as not being properly presented on paper. The thirty-first section of the act provides "that any creditor opposing the discharge of any bankrupt, may file a specification in writing of the grounds of his opposition." And the twenty-fourth rule promulgated by the Supreme Court requires that such creditor "shall enter his appearance in opposition" to the discharge. Beyond all doubt, a compliance with this provision and this rule would require that the "specification in writing" should state the name of the creditor or creditors who make opposition to the discharge, else, should they fail, they could not be adjudged to pay costs. Here, however, the specification in writing gives the name of no creditor. All that it contains concerning the creditors is thus: "Hanna & Knefler, Clough & Wheat, attorneys for opposing creditors." This is not sufficient. The name of every opposing creditor should have been stated.

The motion for a discharge is granted.

A mere failure on the part of the bankrupt to schedule property is not

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a ground for refusing his discharge. Though the act makes a concealment of the same a ground for such action, it must be averred and proved that it was willful. *In re J. D. Bidom*, 8 Bankruptcy Register, 89. But leave will be given to the bankrupt to amend his schedule; then he will be entitled to a discharge. *In re Frederick F. Connell, Jr., Id.*, 118.

Swearing to schedules from which certain property is omitted is not perjury unless the schedules were *willfully* so sworn to. *In re Keefer*, 4 do., 126; 8 C. 8 Chicago Legal News, 125; *In re Robert O. Rathbone*, 1 Bankruptcy Register, 65; *In re Wyatt*, 2 do., 94.—[Reporter.

THE "LULIE D."

DISTRICT COURT.—DISTRICT OF INDIANA.—AUGUST, 1868.

IN ADMIRALTY.

1. Payment to original judgment creditor, made at any time before the judgment debtor has notice that the judgment is assigned, is valid.

2. When a judgment debtor pays to the judgment creditor a part of the amount of the judgment by agreement between them that such payment shall operate as a full satisfaction, such agreement is void, as wanting a sufficient consideration.

3. SILENCE OF ASSIGNEE.—When a judgment creditor assigned his judgment to a third person, and the debtor, hearing a rumor that the judgment has been assigned, but not understanding to whom it was assigned, applied to the assignee for information on that point, and the assignee refused to tell him who was the assignee: *Held*, that, under such circumstances, the debtor might safely pay to the original judgment creditor.

McDONALD, J.—In a proceeding in admiralty in this court, Stephen Groves, on the 28th of February, 1868, recovered judgment for the sum of four hundred and fifty-nine dollars and twenty-nine cents. Pending this proceeding, divers other

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persons intervened for small claims against the steamboat "Lulie D.," and, on the same day, they recovered judgment for divers small sums respectively, amounting in the aggregate to two hundred and eight dollars and seventy-five cents.

The proceeding was originally *in rem*. Under it the vessel was seized. Afterwards, Anthony J. Cavender, the owner, under the provisions of the act of Congress, filed a delivery bond with William Dunbridge and John M. Grace, as sureties thereto. Upon this, the steamer was redelivered to Cavender. On this condition of the case, the said judgments were, by virtue of the act of Congress, rendered on the bond against Cavender, Dunbridge, and Grace. An execution has been issued on these judgments.

On a petition filed on the 23rd of July, 1868, by Cavender, he now moves for the entry of satisfaction of these judgments, and for an order that the marshal return the execution.

None of the judgment creditors, except Groves, make any opposition to this motion. Groves and one David D. Doughty appear by counsel and oppose it.

The evidence in support of the motion and in opposition to it is substantially as follows:

Cavender produces and proves the receipts of all the judgment creditors, except Henry Reno, acknowledging payment in full respectively of each judgment and the costs, and directing the marshal to return the execution. He also produces the receipt of the clerk for all the costs taxed, and for thirty-three dollars and seventy-eight cents, the full amount of Henry Reno's judgment.

Doughty, who claims as assignee of the judgment in favor of Groves, produces and proves an assignment to him by Groves of this judgment, dated March 5, 1868. This assignment was not made of record and witnessed by the clerk, as required by the Indiana statute.¹

¹ 2 G. & H., 866.

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It is proved that before Groves made said receipt to Cavender, which is dated June 26, 1828, Cavender heard a rumor that Groves had assigned said judgment to some person; but he did not hear to whom. Thereupon, Cavender applied to Doughty and to Doughty's attorney to learn to whom the assignment had been made. They both told him that the judgment had been assigned; but they refused to tell him the name of the assignee. Cavender never had notice that Doughty was the assignee till after he procured said receipt from Groves.

The assignment to Doughty was filed in the clerk's office among the papers of this case on the first of July, 1868. Doughty paid, in consideration of this assignment, only five dollars. Cavender paid to Groves, in consideration of the receipt acknowledging satisfaction of the judgment, only twenty dollars.

This is the substance of the whole proof; and the question is, What ought to be done under it?

As to those judgment creditors, who have respectively acknowledged satisfaction of their judgments, and who do not resist this motion, I have no hesitation in holding that satisfaction of their judgments ought to be entered. And the same may be said in regard to the judgment in favor of Henry Reno. But what shall be done in respect to the judgment in favor of Groves?

As to the assignment of this judgment to Doughty, I feel no difficulty. It was not made according to the provisions of the Indiana statute; consequently it has no effect other than what the common law gives to it. Cavender was not bound by it till he had notice of its existence. The rumor that came to his ears was no notice; it was not sufficient even to put a prudent man on inquiry, so as to make inquiry a duty.¹

¹ 4 Kent's Commentaries, 179; Flagg vs. Mann, 2 Sumner, 486; Foust vs. Moorman, 2 Indiana, 17.

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When Cavender applied to Doughty and his attorney for information on the subject of the assignment, they both refused to tell him to whom the judgment was assigned, though they then knew it was assigned to Doughty. This concealment on their part estops Doughty from insisting that Cavender had then notice of the assignment. It is like the case of the owner of property, aware of his rights, standing by and seeing it sold, and making no objections. Cavender had no notice of the assignment of the judgment till after his arrangement with Groves to satisfy it. The assignment, therefore, cannot affect the validity of that arrangement.

But was the arrangement itself valid as a full satisfaction of the judgment? The judgment was for four hundred and fifty-nine dollars and twenty-nine cents. Cavender paid on it twenty dollars, which was the only consideration on which Groves executed the receipt in which full satisfaction of the judgment is acknowledged.

It is undoubtedly the law that an agreement by a creditor to receive on a debt due him a sum less than the debt, though he actually accepts the less sum in full satisfaction of the whole debt, is a void agreement, as not being supported by a sufficient consideration. Such an agreement the present appears to be. Cavender could not, by paying twenty dollars on this judgment, satisfy it. This sum could go no further than its amount towards satisfying the judgment.

As to the motion to have the execution called in, I allow it. All the judgment creditors, except Henry Reno, whose judgment is fully paid, have under their hands ordered the marshal to return the execution. I think, therefore, that he ought to return it. And on the whole case, my decision is:

That all the judgments, except that in favor of Groves, be entered satisfied.

That satisfaction to the amount of twenty dollars be entered as to the judgment in favor of Groves.

That full satisfaction of all the costs that have been taxed be entered; and

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That the execution now in in the hands of the marshal be forthwith returned to the clerk of this court.

I further order and adjudge, that, as against each of the judgment creditors, Cavender recover the costs of this motion arising between him and them respectively; and that, as between Cavender and Groves, each pay his own costs.

Consult *Cavender vs. Groves*, *post* p. 269; *Booth vs. F. and M. Nt. Bk.*, 50 New York, 896, and *Cumber vs. Wane*, 1 Smith's Leading Cases, 146, where the doctrine of satisfaction of judgments or other legal claims at less than their face is elaborately discussed and the authorities collated.—[*Reporter*.

In re DUNKERSON & CO.

DISTRICT COURT.—DISTRICT OF INDIANA.—AUGUST, 1868.

IN BANKRUPTCY.

SECURED CREDITOR.—When a creditor of a bankrupt holds a security for his debt on property which never belonged to the bankrupt, the creditor may prove for his whole debt without first disposing of the security under the provisions of the 20th section of the Bankrupt Act.

Asa Iglehart, for the bank.

A. L. Robinson, for Lowrey & Co.

MCDONALD, J.—This case is before me on a certificate of a Register in Bankruptcy under the 6th section of the Bankrupt Act.

To develop the matter to be decided, perhaps I cannot do better than to copy the substantial part of the register's certificate. He certifies that:—

“The Evansville National Bank presented to him in due

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form their deposition, accompanied by a statement in due form, showing that said bankrupts were indebted to said bank, as indorsers of sundry bills of exchange, in the sum of ninety-eight thousand six hundred and sixty-six dollars and sixty-six cents. Copies of the bills of exchange, upon which the liabilities of the bankrupts were founded, accompany the statement and deposition, and show that Watts, Crane & Co., and Watts, Given & Co., and Given, Watts & Co.—all of which firms are wholly disconnected with the bankrupts—are severally and respectively drawers, indorsers, and acceptors of these bills of exchange, upon all of which the bankrupts are the last indorsers. The vice-president of the bank, who makes the deposition, appends this statement: ‘That said bank holds a claim against George R. Preston for four thousand five hundred dollars, due January 1, 1869, which was procured upon proceedings supplementary to execution upon a judgment obtained against William Brown (of Watts, Crane & Co.) one of the acceptors of the bills of exchange above set forth; that the claim is of the value of \$——; that said bank also holds sundry notes secured by mortgage of which copies are hereto attached, marked B., and which were in May, 1867, the property of Watts, Crane & Co., and which were then given to R. K. Dunkerson of R. K. Dunkerson & Co. (who were the accommodation indorsers for said several firms who are the principal debtors to said bank upon the liabilities herein set out and proven), to indemnify said bankrupts against said indorsements, and also for the better security of the bank as well; that said collaterals were held by and for said bank more than six months before the bankruptcy; that the value of said collaterals is unknown to affiant. The debt claimed by said bank against said bankrupts is the whole amount of said bills irrespective of said claim against said Preston, and irrespective of said collaterals.’ But W. J. Lowrey & Co., who are creditors of said bankrupts, and who had proven their claims in due form, objected to the proof of said claim for the full amount or for any amount, unless said bank would surrender said lien upon the

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claim against said Preston, and said collaterals, or have the same appraised and their value settled by the assignee, who had before that time been appointed, or have the same sold and the value thereof deducted from the amount shown to be due said bank, and the proof allowed for the balance, in accordance with the 20th section of the Bankrupt Act. But said bank wholly refused to have said claim and said collaterals sold in accordance with the provisions of said section, or to have the same appraised or the value thereof agreed upon in accordance with the provisions of said section, or to release or deliver the same up in accordance with the said provisions of said section; but claimed unconditionally the right to make proof of the whole amount due upon said bills of exchange, so indorsed by said bankrupts."

Upon this state of facts, it appears that the register allowed the entire claim of the bank against the estate of the bankrupts, to the sum of ninety-eight thousand six hundred and sixty-six dollars and sixty-six cents, and placed the same on the list of claims proved and allowed. Whereupon the parties agreed that the register should certify the whole matter to me for my decision.

From the facts certified by the register, I conclude that the only question for decision is the following: Is the bank bound to give up the collaterals named, or to make any arrangement concerning them, before being permitted to prove its whole debt of ninety-eight thousand six hundred and sixty-six dollars against the bankrupts Dunkerson & Company?

It would seem from the register's certificate that the creditors who insist on the affirmative of this question, do so on the sole ground that the 20th section of the Bankrupt Act requires it. And, as we are aware of no other provision of that act to which the question under consideration is applicable, we suppose that a proper construction of that section must be decisive of the question.

Before proceeding to consider the 20th section of the act, it may be well, however, to inquire what relevancy the note of

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four thousand five hundred dollars, held by the bank on George R. Preston, has to the merits of the present case. It appears that the bank had coerced that note from William Brown, one of the acceptors of said bills of exchange, and a partner in the firm of Watts, Crane & Co., by a proceeding supplementary to execution. But what connection the bankrupts or any of their creditors, except the bank, have with this note does not appear. The register's certificate, indeed, states that the proceeding supplementary to execution was upon a judgment against Brown, "one of the acceptors of the bills of exchange" on which the claim of the bank for ninety-eight thousand six hundred and sixty-six dollars is founded. But the certificate does not state that this judgment was rendered on Brown's acceptance of those bills; and I cannot presume that it was. I must, therefore, wholly disregard the note on Preston in deciding the question under consideration.

The matter, then, is reduced to this: Divers bills of exchange, amounting in the aggregate to ninety eight thousand six hundred and sixty six dollars, are drawn, accepted, and indorsed by several mercantile firms to procure accommodation in the bank. These firms apply to Dunkerson & Co., the bankrupts, for accommodation indorsements of them, and to the bank to discount them. Dunkerson & Co. and the bank ask some collateral security. It is given them by the delivery to the bank of "sundry notes secured by mortgage, and which, in May, 1867, were the property of Watts, Crane & Co., and Given, Watts, & Co." Thereupon Dunkerson & Co. indorse the bills, and the bank discounts them. They are dishonored. Dunkerson & Co. become bankrupts. The bank offers to prove the bills as debts against them for dividends out of their assets. Certain creditors object, unless certain things proposed to be done under the 20th section of the Bankrupt Act are first performed. This seems to be the substance of the whole matter. And it involves this question: When a creditor holds a debt against a bankrupt whose liability arises by his accommodation indorsement of bills of ex-

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change, to secure the payment of which, the drawers and acceptors of the bills have delivered to the creditor "sundry notes," as collateral security, may the creditor prove his whole debt and have it allowed against the estate of the bankrupt without regard to these collaterals?

If this question should be answered in the affirmative, it must be because the provisions of the 20th section of the Bankrupt Act do not reach the case.

On a careful examination of that section, it will plainly appear that in its letter it does not comprehend the case under consideration. For, so far as it relates to mortgages, pledges, and liens at all, the letter of the section only includes "a mortgage or pledge of real or personal property *of the bankrupt*, or a lien *thereon*." Now, it is not pretended that the collaterals in question were ever property of the bankrupts, Dunkerson & Co. On the contrary, the register's certificate distinctly states that they were "the property of Watts, Crane & Co., and of Given, Watts & Co. Clearly, therefore, if we are strictly to construe the section according to its letter, it does not extend to the present case, and the register was right in passing the whole claim of the bank.

But it is a very grave question whether this section should be thus strictly construed. Rather, ought we not to construe it liberally and according to its spirit? There are plausible reasons for the latter construction.

In the first place, it is the obvious policy of the Bankrupt Law to favor equity among *bona fide* creditors. Equitable principles pervade that law; and "equity loves equality." If we construe the 20th section of the act strictly and literally, we give the bank an advantage over the general creditors of the bankrupts; if liberally and according to its spirit, we may put them all on an equality. We are bound, therefore, if we can without violence to the language of this section, so to construe it as to extend its operation to the case at bar.

Moreover, if in this case instead of Dunkerson & Co., Watts, Crane & Co., who are the principal debtors on these

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bills, were the bankrupts, it would be very clear that the bank would not be allowed to prove for any part of its debt without first disposing of the collaterals as required by said 20th section. And, since the debt is one and the same, since Watts, Crane & Co. are the principal debtors, and Dunkerson & Co. but sureties for them, is it equitable that facts which would avail to prevent the proof and allowance of this debt as against the former company if they were bankrupts, cannot avail to the same purpose when the latter are bankrupts? As to principal and surety, it is a general rule that the surety may resist payment on any ground which would be a good defense on the part of the principal.

Furthermore, the same reason which requires a creditor holding a lien for his debt on a bankrupt's property to dispose of that lien according to the 20th section of the act before proving his debt, equally applies where he holds the lien on the property of some other person. The only reason in both cases seems to be that it is not equitable to permit a creditor of the bankrupt holding collateral security for his debt first to prove the whole of it, and share equally with other creditors for the whole of it out of the common fund, and afterwards to resort to his collateral security to put him in a better condition than that of other creditors. The section in question virtually says to the lien-holder, If you ask equity, you must do equity. Since your lien puts you in a better condition than other creditors, if you want a dividend out of the common fund, you must first deduct from your debt the value of your lien and take your dividend on the residue of your debt; or you must release your lien to the assignee and, thus putting yourself on a footing with other creditors, take the dividend on your whole debt; or, if the property on which you hold your lien is worth more than your debt, you may keep it in satisfaction thereof, and, instead of asking a dividend, pay the excess of its value into the common fund for the use of other creditors.

If we adopt this line of reasoning, we should conclude that

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the provisions of the 20th section of the act extend to the case at bar. And it must be confessed that such a conclusion is supported by several respectable authorities.¹

But the conclusion to which this line of reasoning leads is attended with serious, if not insuperable, difficulties. Indeed, I think a construction of the section in question, founded on this reasoning, involves absurdities which cannot be tolerated. Some of these are as follows:

First. This section provides for a sale, in certain cases, of the property on which the lien attaches. Now, whether the property be personal or real, there is generally, in such cases, an equity of redemption. This exists in the person who is the general owner of the property. If he is the bankrupt, a sale of the property under the direction of the court would vest a good title in the buyer, because the holder of the equity of redemption is a party to the judicial proceeding. But if he who holds the equity of redemption is not the bankrupt, but a stranger, no such sale could vest his interest in the buyer. This remark applies only to a sale by agreement of the lien-holder and the assignee, authorized by said section.

Second. This section provides that, in certain cases, the lien-holder may retain the property at its value, and prove for the residue of his debt. This provision evidently contemplates the vesting of a perfect title to the property, including the equity of redemption, in the creditor. But this could not be done unless the property when the lien attached belonged to the bankrupt.

Third. The section under consideration provides that, if the value of the property on which the lien attaches exceeds the debt secured by it, the assignee may "release to the creditor the bankrupt's right of redemption therein on receiving such excess." Obviously this could not be done in the pres-

¹ *Lanchton vs. Wolcott*, 6 Metcalf, 305; *Amory vs. Francis*, 16 Massachusetts, 306; *Richardson vs. Wyman*, 4 Gray, 553.

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ent case, though the collaterals exceeded in value the debt due to the bank. For, as these collaterals never belonged to the bankrupts, they never had any equity of redemption in them. Consequently, the assignee could not release these "bankrupts' right of redemption therein."

Fourth. This section provides that, in certain cases, the assignee shall "sell the property subject to the claim of the creditor thereon," and "shall execute all deeds and writings necessary or proper to consummate the transaction." This plainly means that he may sell and convey the equity of redemption. Clearly he has power to do this whenever the equity of redemption is in the bankrupt; for he officially represents the bankrupt's interests, or rather the bankrupt's interest is vested in him. But if the property on which the lien attaches never belonged to the bankrupt, he never had any equity of redemption in it, and so no such thing could vest in his assignee or be sold or conveyed by him.

These considerations, viewed in connection with the unequivocal language of the 20th section of the Bankrupt Act confining its provisions to mortgages and pledges "of real or personal property of the bankrupt or a lien thereon," lead me to the conclusion that no reasonable construction of the section can extend its provisions to liens of the creditors of a bankrupt on property of which he was never the owner.

In this conclusion, I am supported by high authority.

Under the English bankrupt law, which does not differ much from our own on the points relating to the question under consideration, the rulings of the judges will be found to agree with the conclusion to which I have come in this case.¹

My ruling in this case is also in conformity with a decision of Mr. Justice Story under the Bankrupt Law of 1841, in the

¹ See *Ex parte Bennett*, 2 Atkyns, 527; *Ex parte Parr*, 18 Vesey, 65; *Ex parte Goodman*, 3 Maddox's Chancery Reports, 373; *Ex parte Plummer*, 1 Atkyns, 103.

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case of *Babcock*.¹ That case was very much like the present; and the learned judge held that a distinction must be taken between the case of a security given to the creditor by the bankrupt himself of his own property, and the case of a security of a third person transferred to the creditor by the bankrupt, or otherwise. And he decided that "in the former case, the creditor is not allowed to prove his debt against the bankrupt, unless he surrenders up the security, or it is sold with his consent, and then he may prove for the residue of his debt which the security when sold does not discharge. In the latter case, he may prove his debt in bankruptcy without surrendering the security of the third person which he holds, and may, notwithstanding such proof, proceed to enforce his security against such third person, provided, however, he does not take, under the bankruptcy and the security, more than the full amount of his debt." In my judgment, precisely so may the Evansville National Bank do in the case at bar.

I am gratified to find that, in the conclusion to which I have come in the present case, I am fully sustained by a late decision of Judge Fox of the District of Maine, in the matter of Nathaniel O. Cram, made under the present Bankrupt Law, and reported in *The Gazette and Bankrupt Court Reporter*, of December 16, 1867, p. 85.² That case was almost in every respect like the present. The Casco National Bank presented a claim against the estate of Cram, the bankrupt, on note for eighty thousand nine hundred dollars, executed by a manufacturing company and indorsed by Cram. These notes were secured by mortgages on personal and real estate executed by the manufacturing company to the bank. It was objected that proof of the debt in favor of the bank could not be allowed without first deducting the security held by it. And this objection was made, as in the present case, under the provisions

¹ 3 Story, 393.

² S. C. 1 Bankruptcy Register, 132.

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of the 20th section of the Bankrupt Act. But the learned district judge, in an elaborate and exceedingly well-reasoned opinion, overruled the objection and ordered the proof to be taken. I entirely approve his reasoning and his decision.

The doings of the Register, Charles H. Butterfield, Esq., in the premises are approved and affirmed, which is ordered to be certified, &c.

For further authorities confirmatory of the above case, see *Agawam Bank vs. Morris*, 4 Cushing, 99; *Ex parte Adams*, 8 Montagu and Ayrton, 157; *Ex parte Peacock*, 2 Glyn & Jameson, 27; *Ex parte Hedderly*, 2 Montague Deacon and DeGex, 487.

See also *Richardson vs. City Bank*, 11 Gray, 261.—[Reporter.

In re PRYOR.

DISTRICT COURT.—DISTRICT OF INDIANA.—SEPTEMBER, 1868.

IN BANKRUPTCY.

1. **BANKRUPT MUST NOT SELL PROPERTY.**—Under no circumstances can the bankrupt, after he has filed his petition and schedule, be justified in selling any of his property without leave of the court.

2. **EXEMPTION.**—If the bankrupt is dissatisfied with the exemption of property allowed him by the assignee, his only mode of redress is to except to the ruling of the assignee, and have him certify the question to the district court.

MCDONALD, J.—Richard Pryor, the bankrupt, by his petition filed, states that he became a voluntary bankrupt by decree of this court on the 12th of March, 1868; that he was

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then a retail dealer in groceries and farming implements at Logansport, Indiana, and had then on hand for sale a considerable stock of said goods; that if the same had been allowed to remain long on hand, they would have greatly depreciated in value; that therefore, "by the advice of counsel, and at the request of the creditors of his estate," he proceeded for fifty-eight days to sell said goods at retail, to the amount of eight hundred dollars; that, by his so doing, "great benefit was derived to the creditors;" that, in order to make such sales, he paid ten dollars for a United States revenue license; that in transferring his property to the assignee, he was unable to pay over but six hundred dollars of the proceeds of said sale, he having in the meantime expended the residue in the maintenance of his large and helpless family; and that the assignee has only allowed him, by way of exemption, the sum of three hundred and fifty-two dollars, whereas, he ought to have allowed him in addition the said residue of the proceeds of said sales. The petition prays that this court allow him said residue, amounting to two hundred dollars, as a part of his property exempt from the operation of the Bankrupt Act, and also the ten dollars which he paid for a license, with pay for his services in making the sales.

So far as anything appears, the conduct of the bankrupt in making said sales was not attended by any bad motive on his part. Yet his proceeding therein was utterly unlawful. If there was danger that a delay to sell the goods would cause a depreciation in value, he might have applied to the court, which would doubtless have afforded a proper remedy. It would be a dangerous precedent to permit any man, after he has been declared a bankrupt, without any authority from the court, to sell any of his property, and afterwards, by an *ex post facto* decree, have his lawless proceedings legalized. As the sale of the goods was in violation of law, the bankrupt has no legal claim to be paid for his services in making the same, or for the ten dollars which he paid for a license. As to the action of the assignee, in refusing to allow the bankrupt

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to retain, as exempt from the operation of the law, any of the estate over three hundred and fifty-two dollars, I think, from the facts stated in the petition, it was a very meagre allowance. The bankrupt is an old, feeble man, unable to perform manual labor. He has a wife and four children dependent on him for a support. Under such circumstances, if true, it should seem that a more liberal exemption ought to have been made. But the assignee doubtless had better means to ascertain what was right and fair in the premises, than I can have by the mere examination of the petition. He may have been cognizant of facts of which I am ignorant, and which may have justified him in what he did. Be this, however, as it may, it is certain that I cannot reverse the decision of the assignee on the petition now before me. The 14th section of the Bankrupt Act, provides that, in a matter of this kind, the determination of the assignee "shall, on exception taken, be subject to the final decision of the court." The only mode, therefore, as I think, by which such a question can be brought before me, is first to except to the decision of the assignee, and then have him to certify the matter to me. This, I suppose, need not be done in the shape of a formal bill of exceptions. I think it would be sufficient for the assignee to state in writing the facts on which his decision was made, what was his decision, and the fact that the bankrupt excepted to it.

The petition is dismissed at the cost of the bankrupt.

The transfer of promissory notes by the payee, during the pendency of bankruptcy proceedings against him, upon which he was afterwards adjudged a bankrupt, vests no title in the purchaser, even though he had no actual notice of the bankruptcy proceedings. The assignee can recover such notes, even from a *bona fide* purchaser. *In re Lake*, Volume 3 of this Series, 204.

As to the mode of proceeding, upon the assignee's exemption certificate, see *In re Thiell*, ante p. 241.—[Reporter.]

Huchberger vs. Merchant's Fire Ins. Co.

LEHMAN HUCHBERGER *et al.* vs. THE MERCHANTS' FIRE INSURANCE COMPANY
OF HARTFORD, CONN.CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—
OCTOBER, 1868.

FRAUD IN INSURANCE.

1. If the insured has intentionally endeavored to make out his loss larger than it was, he cannot recover his actual loss; otherwise, if he make out the loss from his best recollection, without intention to deceive.

2. BURDEN OF PROOF.—The defense of incendiarism, fraud, or negligence must be made out by a preponderance of proof. Such proof may, however, be circumstantial, if sufficient and convincing.

3. Credibility of witnesses is the province of the jury alone—tests of evidence stated.

This was a suit to recover on one of several policies of insurance to the amount of four thousand six hundred dollars on a stock of goods owned by the plaintiffs in the store No. 173 Lake street, Chicago, which was destroyed by fire on the 2d of March, 1867. No question was made that the fire occurred, and that the plaintiffs complied with the stipulations of the policy, and furnished in proper season proof of loss.

Two defenses were interposed to the action: *first*, that the plaintiffs set fire to their own store, or acted with such gross negligence as to vacate the policy; and, *secondly*, that they furnished a false and fraudulent account of the kind and value of the goods destroyed.

F. A. Hoffman and E. A. Storrs, for plaintiffs.

O. B. Sansum, Robert Hervey, and Thomas Hoynes for defendant.

DAVIS, J., after stating the facts, charged the jury as fol-

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lows: If either of these defenses are true, of course the plaintiffs cannot recover. Whether they are true or not, it is your province to decide.

The solution of these questions depends solely on the conviction produced in your mind by the facts given in evidence. The law applicable to the case is very simple, and will give you no trouble. It suggests itself to the common mind. The insurance company did not agree to pay if the parties purposely destroyed their own property, or if by their own negligence it was burned up; nor can the plaintiffs recover if they intentionally endeavored to make out their loss larger than it was, although the jury may believe they did suffer a serious damage. If they come into court with unclean hands, the law will not help them to get the value of the goods really destroyed. But if the plaintiffs made the estimate from their best recollection, not having their books before them, and not having an intention to deceive, they can recover. While the law allows indulgence for mistakes honestly committed, it does not relieve if there be a purpose to commit a fraud.

The first thing to be observed is that the nature of the defense is such as to throw the burden of proof onto the defendant. There is no question that the plaintiffs are entitled to recover unless one or the other of the defenses is proved, and of this the jury must be satisfied by a preponderance of evidence. If the evidence is evenly balanced in their minds, or, in other words, if they are in doubt as to what is the truth of the case, they will find for the plaintiffs. There is no positive proof that either of the defenses is true. The proof is circumstantial. If there is enough of this kind of evidence, it is often times as convincing to the mind as positive proof; and, notwithstanding the character of the defenses, if you are convinced from the evidence that one or both are established, there should be no hesitation in finding for the defendant. But as this finding necessarily stamps the plaintiffs as dishonest men, you should not be swift to come to such a conclusion. The case itself requires the application of your best judgments and the highest power of discrimination

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The credibility of witnesses is for the jury. The court cannot instruct you who to believe and who to disbelieve. There is no artificial rule of belief to control the minds of a jury. Some witnesses by their appearance on the stand impress the jury that they are impartial between the parties and tell the truth. Other witnesses who testify show such bias and tell their story in such a way that the mind hesitates to place implicit reliance on what they say. To such witnesses you should apply the best of your common sense;—how did they bear themselves on the stand? Was the evidence favorable? Was it consistent with ordinary human conduct? Did they stand the test of cross-examination? Have they been successfully contradicted or impeached? Have they shown malice? These are matters proper to be considered in examining the value of the testimony on which the case turns. The respective counsel have given you their views elaborately, and it is your province to settle the controversy.

I do not think it necessary to examine the evidence at length. The issues are definitely made, and easily understood. It is your duty to apply the evidence to them, in order to their correct determination. You had better take up one of these issues at a time. Was the fire the result of accident or design? The defendant's counsel urge that if the plaintiffs did not set fire to the store, there was gross negligence on their part which contributed to the accident; even the witness who seeks to prove this part of the case, by his testimony seems to so place it that the question of negligence disappears in the crime of arson. Therefore the point to consider is, Was this fire caused by the plaintiffs or their agents? The main witness on this subject is one Stark. Apply the tests I have given you to this witness in order to determine whether he is worthy of credit. Is his story probable? Is it consistent with the conduct of men of ordinary intelligence? Did he come out of the cross-examination as a man that impresses you with the conviction that he was telling the truth? Has he been successfully contradicted? Test his cred-

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ibility by these rules. If you believe him, there is an end of the case, for he swears to enough to convict Huchberger of arson. But if he does not convince you, then the second defense made in the action is to be considered, that is, that the plaintiffs rendered a false account of the loss they sustained by the fire. The consideration of this question involves a review of the main part of the evidence which has occupied for so long a time the attention of the court and jury. If, after carefully viewing all the evidence on this subject, you are satisfied that the plaintiffs intended to commit a fraud on the insurance company, you will find for the defendant. If, on the contrary, the evidence satisfies you the account was true, you will find for the plaintiffs; or, if the evidence satisfies you that the account of loss was not true, but mistakenly rendered, without fraud or the intent to defraud, you will find for the loss actually sustained. If you come to the latter conclusion, that there was no intentional wrong, but that the loss was actually less than the plaintiffs say, you will find accordingly. The risk in this case is two thousand five hundred dollars.

Willful or negligent conduct on the part of the insured, by which salvage is lost, might discharge the underwriter, as fraud certainly would. 1868, *Dunham vs. New England, &c. Ins. Co.*, 1 Lowell, 253.

In an action on an open policy of insurance, a discrepancy between the value of the goods destroyed, as sworn to by the insured, and the value as proved on the trial, is not necessarily evidence of fraud against the company on the part of the insured, 1871. *Beck vs. Germania Ins. Co.*, 23 Louisiana Annual Reports, 510.—[Reporter.]

ANTHONY J. CAVENDER vs. STEPHEN GROVE.

CIRCUIT COURT.—DISTRICT OF INDIANA.—OCTOBER, 1868.

1. JUDGMENT—HOW ASSIGNABLE.—In Indiana, judgments are assignable by indorsement on the records of them, attested by the clerk.

2. PAYMENT TO ASSIGNOR.—Judgment may be assigned otherwise than of record. But in such case any payment or satisfaction of the judgment made to the assignor before the defendant has notice of the assignment, is valid.

3. No agreement for the full satisfaction of a judgment, made in consideration of the payment of a less sum than the amount of the judgment, is a full satisfaction of it.

4. SATISFACTION—DEFENSE.—On a motion to enter satisfaction of a judgment, nothing can be heard in support of it which might have been set up as a defense to the action in which the judgment was rendered. But if such defense is omitted to be pleaded to the action, and if it might be the subject of a cross action against the party recovering the judgment, the matter of such defense may, by agreement of the parties, furnish sufficient consideration for a contract between them to satisfy the judgment.

5. SATISFACTION—BURDEN OF PROOF.—When a judgment creditor executes a written acknowledgment of the satisfaction of his judgment, and this is duly shown in evidence on a motion for satisfaction to be entered, the burden of proving that such acknowledgment is void for want of consideration or otherwise devolves on the creditor; and if he fails to make such proof, satisfaction of the judgment will be entered.

Hanna & Knefler, for the motion.

Charles E. Marsh, contra.

MCDONALD, J.—In a proceeding in admiralty in this court, on the 28th of February, 1868, Stephen Grove obtained a judgment by default against Anthony J. Cavender for four hundred and fifty-nine dollars and twenty-five cents. Execution has been issued upon this judgment, and levied on Cav-

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ender's property. Cavender now moves for an entry of satisfaction of this judgment.

Among other things, Cavender, in support of his motion, produced a paper signed by Grove, dated June 26, 1868, acknowledging full satisfaction of the judgment, and directing the marshal to return the execution.

Cavender also showed in evidence the clerk's receipt in full for one hundred and thirty-eight dollars and fifty-seven cents, including all costs in the case, dated July 17, 1868.

There was evidence in support of said acknowledgment of satisfaction by Grove, to the effect that Cavender had complained, after the judgment was rendered, that it was given for a far larger sum than was due; that deductions by way of payment, or set-off, or counter-claim, should have been credited on the claim, and were not; and that in the making of the settlement, at the time when the acknowledgment of satisfaction was executed, these deductions were taken into the calculation and allowed by Grove, as well as certain payments made by Cavender after the rendition of the judgment. And I think these facts are sufficiently established.

It is certain that at no time after the judgment was rendered did Cavender pay on the judgment anything like the amount of it.

In opposition to the motion, it was proved that, in consideration of five dollars, Grove, on the 5th of March, 1868, and before his acknowledgment of satisfaction, assigned the judgment to David D. Doughty. This assignment was not made on the record of the case as required by the statute of Indiana, but on a separate paper which was filed among the papers of the case July 1, 1868.

Doughty, as well as Grove, appears by counsel and resists the motion.

The evidence further shows that Cavender, soon after this assignment, heard a rumor of it, and applied to Doughty and to the attorney of Grove for information on the subject; and that they told him it was assigned, but would not tell him to

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whom the assignment was made, because, as they allege, they did not want to be pestered by him about it. The attorney, however, informed him that if he would make arrangements to pay a part of it, he would tell him who was the assignee. All this happened before the date of the acknowledgment of satisfaction. Other evidence was given on both sides, on the question whether at the time of execution of the acknowledgment of satisfaction, Cavender had notice of the assignment. I think that such notice is not established by the evidence; and I think that, under all the circumstances, the failure of Doughty to inform Cavender that he, Doughty, was the assignee, estops him from now alleging that Cavender had notice. Fair dealing required that when Cavender asked Doughty for information touching this assignment, he should have told him the whole truth. It might indeed have been otherwise, if Cavender had, from any other source, had satisfactory information of the assignment before the settlement with Grove. But, though there was some evidence leading to that conclusion, it is too vague to establish it. Upon the whole, therefore, I conclude that Cavender, when he took the acknowledgment of satisfaction, had no legal or equitable notice that Doughty was assignee of the judgment.

Since, then, Doughty did not procure the assignment of record, as required by the statute; and since Cavender, when he settled the judgment with Groves, was not aware that Doughty was the owner of it, Doughty must be considered as holding it subject to all equities.¹ And I thus conclude the more readily and willingly, when I consider that he gave only five dollars for it—less than one-ninetieth of the face of it. I cannot think that a purchaser under such circumstances is entitled to the favorable consideration of any court. And, upon the whole, I think that I ought to regard the claim of Doughty as entirely out of the question in considering the present motion.

¹ Robeson vs. Roberts, 20 Indiana, 155.

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Then, the only point for inquiry is, whether as between Grove and Cavender this judgment ought to be deemed satisfied.

The written acknowledgment of satisfaction shown in evidence is certainly sufficient *prima facie* proof. It has been attempted, however, to overthrow the *prima facie* case thus made by other evidence showing clearly enough that but a small portion of the judgment has been paid since its rendition. As already stated, it appears by the evidence that after the judgment by default was rendered, Cavender complained that the judgment was for too large a sum; and that Grove ought to have credited his claim with divers items, and only taken judgment for a small balance; whereas, he took it for the whole claim without these credits. And it appears further by the evidence, that in the negotiation which resulted in the execution of the acknowledgment of satisfaction, these credits were insisted upon by Cavender, and probably allowed by Groves. Though in relation to this whole matter, the evidence is very vague and unsatisfactory.

It is certain that the payment of a sum less than the amount due on a judgment or other debt cannot operate as a full satisfaction thereof, even though it is agreed between the parties, at the time of such payment, that it shall so operate. And it is equally clear that, on a motion to enter satisfaction of a judgment, nothing can be heard in support of it which might have been set up as a defense to the action on which the judgment was rendered. But I deem it equally clear that if such a defense is omitted to be pleaded to the action, and if it might be the subject of a cross action against the party recovering the judgment, the matter of such defense may very well, by agreement of the parties, furnish a sufficient consideration for a contract between them to satisfy the judgment. Such, I think, was the case. Cavender paid some money to Grove after the judgment was rendered. He had a claim against Grove in relation to the subject matter of the action before the judgment was rendered. This claim Grove afterward

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recognized as valid and subsisting, and the settlement of which he seems to have taken as a part of the consideration upon which he executed the acknowledgment of satisfaction of the judgment. I think that this was all right; and that I ought to hold him to his bargain.

It has been urged, indeed, in opposition to the view above expressed, that the facts from which the conclusion is deduced are not well proved. It must be admitted that the evidence of these facts is by no means satisfactory. But it should be remembered that Cavender, by the production in evidence of the written acknowledgment of satisfaction of the judgment, *prima facie* established all that was necessary to sustain his motion. The burden then devolves on Grove to overthrow the *prima facie* case thus made. It did not devolve on Cavender to prove that the acknowledgment of satisfaction was founded on a sufficient consideration; but it devolved on Grove to prove that the consideration on which the acknowledgment was founded was insufficient. On this point arises the uncertainty of the evidence. It was for him to remove that uncertainty; and I think he has not done it. On the contrary, I am inclined to think that I may safely deduce from the evidence, vague though it be, the facts which I have above stated.

It follows that the judgment must be entered satisfied.

Consult *The Lulie D.*, ante p. 249. and cases there cited.—[Reporter.

The Tug Mosher.

THE TUG MOSHER.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER. 1868

IN ADMIRALTY.

1. DUTY OF TUG—TOW.—The measure of a tug's duty is reasonable diligence and ordinary skill. The tug is not an insurer of the safety of the tow, nor held to the highest nautical skill.

2. KNOWLEDGE OF CHANNEL.—The tug is bound to know the ordinary proper channel, but the responsibility is changed where the channel is shifting.

3. A schooner having taken the chances of entering in a storm, a harbor with a shifting channel, the tug is not to be held responsible, in the absence of proof of negligence, if the schooner touches some ridge of sand.

4. DUTY AFTER STRANDING.—The tug is only bound to employ those means consistent with her own safety; she is not obliged to lay by the tow, when that would endanger herself.

Appeal from decree of the district court dismissing a libel filed by Sallie F. Dobbie and others, owners of the schooner Nicaragua, against the Tug Mosher, to recover damage caused by the alleged negligence of the tug while towing the Nicaragua. The facts are stated in the opinion.

Miller, Van Arman & Lewis, for libellants.

George B. Hibbard, for insurance company.

Sandford B. Perry, for cargo.

Robert Rae, for respondents.

DAVIS, J.—This case was argued at the last fall term by eminent counsel. I have since read all the testimony carefully, and although the case is not free from doubt, I am unable to

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see wherein the views of the district court are incorrect. I shall content myself with stating the ground on which I justify this conclusion.

The schooner Nicaragua, owned by libellants, on the 6th of August having encountered a heavy wind and high sea, which continued during the day, came to anchor, and shortly after, the tug Mosher took her in tow. The schooner furnished the tow line. The first broke; a second bore the strain. The vessel in the act of being towed into the harbor was stranded and ultimately lost. Is the tug responsible for this loss?

It is charged that the accident happened through the negligence and want of care of the officers of the tug, and that, at any rate, the disaster would not have been so ruinous, if these officers had used proper efforts to relieve the Nicaragua.

The first question is, What degree of diligence and skill was required of the tug? The rule is well settled that reasonable diligence and ordinary skill is the measure of the tug's duty. The tug did not engage to insure the safety of the tow, nor for the use of the highest nautical skill. I think Judge Drummond stated the rule fairly, that the tug is bound to know the ordinary and proper channel into the harbor and to exercise reasonable skill under the circumstances, in towing the vessel.

As usual in cases of this kind the testimony is very conflicting and not easily reconcilable. It is claimed the schooner was kept windward of the tug. The weight of testimony is to the contrary. Neither do I think the tug went too far south. In my opinion the case turns on the condition of the channel at the time of the accident. The responsibility would have been very different if the channel was regular and established. Like the district judge, I do not wish to relax the need of caution of tugs in towing vessels nor establish harsh rules to make them insurers of property. There was no settled channel; it was in a shifting state. The old channel into the harbor had been substantially abandoned; it had been partly made in 1863-4, and about the time of this accident, whenever

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the dredging boats could work, they were dumping in one place and taking ground from another. The weather was changing, and during storms shoals would form. The channel was, in fact, a moving, changing channel. If an accident happened in towing a vessel through such a channel during a storm of several days' continuance, the tug, if it was managed with reasonable nautical skill and judgment, cannot be held responsible.

In what respect did the Mosher show less diligence and skill than required? The schooner having taken the chances of entering the harbor in a storm, the tug is not to be held responsible, in the absence of proof of negligence, if the schooner touched some ridge of sand.

It is urged that she went aground on the old sand-bar. Although satisfied that she was ultimately wrecked there, I am not satisfied she first struck there. The winds and waves drove her south, and the probability is that her first position was changed.

But the tug is blamed for not using more effort than she did to get the schooner off the bar; in other words, is charged with fault in abandoning the schooner too soon. It is hard to get at the truth, for the witnesses on each vessel differ materially in their account of what occurred. At the argument it did seem to me that the tug left the schooner to her fate sooner than she ought to have done, but since reading the testimony, I cannot say that she did not employ all the means practicable and consistent with her own safety. The captain of the tug was not obliged to stay by the schooner if in good faith he believed he would endanger his own vessel.

On both points he is supported by the testimony. I think the decree dismissing the libel should be affirmed.

As to the duty of a tug in a narrow channel, and especially with reference to a propeller meeting the tug and tow consult *The Alleghany*, Vol. 1 of this Series, 497, and cases there cited. As to duty of tug with respect to speed, see *The Alleghany*, Vol. 2 of this Series, 29; and as to respective duties of tug and tow, consult *The Tug Brothers*, Vol. 2 of this Series, 104,

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and numerous authorities there cited. For the relative duty and liability of the tow, consult a recent opinion by Judge Drummond, *The Tug Margaret*, July, 1873, in subsequent Volume of these Reports; also, *The Tug Lewis and Bark Alina*. 6 Chicago Legal News, 304, June 18, 1874.—[Reporter.]

In re R. K. DUNKERSON & CO.

DISTRICT COURT.—DISTRICT OF INDIANA.—JANUARY, 1869.

IN BANKRUPTCY.

DISTRIBUTION OF ASSETS—PARTNERSHIP AND INDIVIDUAL DEBTS.—The Bank of Kentucky held drafts drawn by Given, Brown & Co. on R. K. Dunkerson & Co. and accepted by the latter. R. K. Dunkerson was a partner in both the firms. Both were adjudged bankrupts. Dunkerson had separate assets more than enough to pay his individual debts. The bank proved its debt both against Dunkerson individually and against the firm of Dunkerson & Co. In the distribution of assets, the bank claimed the right to a *pro rata* dividend, out of the separate assets of Dunkerson, equally with his individual creditors, as well as a right to a dividend in the joint assets of the firm. *Held*, that the claim of the bank on the separate assets of Dunkerson's individual estate could not be allowed.

Asa Iglehart, for the bank.

MCDONALD, J.—In this case, Charles H. Butterfield, Esq., one of the registers in bankruptcy, has certified certain facts for my decision. He certifies

“That there are two cases pending in this court in which the question is involved, namely, the case of R. K. Dunkerson, Alexander Wilson, and Enoch Schoenlaub—formerly partners as R. K. Dunkerson & Co.—and the case of R. K. Dunkerson.

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The schedules in the former case set forth the individual liabilities and assets of the said partners, and also the partnership liabilities and assets. The schedules in the latter case set forth the individual liability and assets of Dunkerson, and also his liabilities and assets as a member of the firm of Given, Brown & Co., of which last-mentioned firm said Dunkerson was a member at the time of the filing of his petition for adjudication of bankruptcy.

“The Bank of Kentucky, one of the creditors of R. K. Dunkerson & Co., holds certain drafts, in all amounting to ten thousand dollars, drawn by Given, Brown & Co. (of which firm said Dunkerson at the time of the drawing of said drafts was a member) on R. K. Dunkerson & Co., and by said last-mentioned firm accepted. The Bank of Kentucky has proven the said amount of ten thousand dollars, in due form before the register in bankruptcy in Louisville, Kentucky, against the firm of R. K. Dunkerson & Co., and also against said R. K. Dunkerson—or, in other words, has proven their said claim in both the cases mentioned in the first part of this certificate. And the said Bank of Kentucky now claims that the individual assets of R. K. Dunkerson, which are largely in excess of the claims against him individually, shall be applied so far as they will go to the satisfaction of the claims of the said Bank of Kentucky; and that, for any balance which may be found due said bank, after applying said Dunkerson’s individual assets as aforesaid, the said bank shall be allowed to share, *pro rata*, with the general creditors of R. K. Dunkerson and to which the First National Bank of Evansville—also a creditor of the bankrupts in all said cases—objects, and insists that the said Bank of Kentucky shall only share *pro rata* with the general creditors of R. K. Dunkerson & Co.; and that the individual assets of R. K. Dunkerson, after paying his individual debts, be applied to the payment—so far as they will go—of the claims of all the general creditors of the said firm of R. K. Dunkerson & Co. The firm of Given, Brown & Co. have filed a petition for adjudication of

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bankruptcy in the United States District Court for the District of Indiana, upon which adjudication has been made, and an assignee appointed."

The question to be decided is simply this: Under the circumstances above stated, shall the Bank of Kentucky occupy the same ground in the distribution of assets as all the other creditors of the firm of R. K. Dunkerson & Co., or has the bank a right first to take a dividend out of the individual assets of R. K. Dunkerson & Co., and then for the residue of its debt to share equally with other creditors of Dunkerson & Co. in the joint assets of that firm?

"Equity loves equality." A leading object of the Bankrupt Law is to make all creditors of a bankrupt share equally. And this obvious and just policy of the law must be followed in every case in which there is no special reason for an exception to the general rule. Does the present case embrace any such exceptions? The drafts in question were drawn by Given, Brown & Co. on R. K. Dunkerson & Co., and by the latter accepted. Does the fact that Dunkerson is a partner in both these companies give the Bank of Kentucky any special claim on Dunkerson's separate assets superior to the claims of other creditors of Dunkerson & Co.? I cannot think so. It is probable, indeed, that the bank will necessarily have some advantage over other creditors of the last-named company; for, as both the companies are in bankruptcy, the bank may, after taking its dividend in the assets of Dunkerson & Co., receive a dividend from the assets of Given, Brown & Co. But this advantage would arise from the fact that both these companies are indebted, as drawers and acceptors, to the bank on the same bills. To give the bank the additional advantage which it asks, would be more than it deserves.

If Dunkerson had individually indorsed these drafts, or in any way incurred a separate individual liability on them, the preference claimed by the bank might perhaps be allowed. At least it is so held under the English Bankrupt Law. But

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it is much doubted whether, even in that case, such preferences would be given in the United States.¹

I decide that the Bank of Kentucky must first take its *pro rata* dividend out of the assets of Dunkerson & Co., equally with the other creditors of that firm, and must afterwards share equally with them in the individual assets of Dunkerson, if any remain after fully satisfying his individual creditors.

Consult *In re Bradley*, Vol. 2 of this Series 515; *In re Knight*, Id. 518; *In re Wm. H. Wiley*, ante p. 234; *In re Dunkerson & Co.*, ante p. 253.—[Reporter.

¹ See *Mead vs. National Bank of Fayetteville*, 7 American Law Register, (N. S.) 818; 6 Law Reporter, 21

THE UNITED STATES vs. JONATHAN M. DAIR *et al.*

DISTRICT COURT.—DISTRICT OF INDIANA.—JANUARY, 1869.

1. PENAL BOND—PLEADING.—A breach of the condition of a penal bond is not sufficiently traversed by a plea averring that the obligors have not violated the condition to the extent charged in the declaration. It should deny any breach of the condition as charged in the declaration.

2. ESCROW.—A special plea of *non est factum*, averring that the supposed bond sued on is a mere escrow, is bad, unless it avers that the instrument in question was delivered to some third person on a condition that has not been performed. But with such an averment, the plea may be a good special *non est factum*.

A. Kilgore, U. S. District Attorney, and J. W. Gordon,
for plaintiff.

United States vs. Dair.

Milligan, McDonald, Roach, and McDonald, for defendants.

MCDONALD, J.—Debt on a penal bond, against the principal and his sureties. The condition of the bond is that Jonathan M. Dair, the principal, a distiller, should in all respects comply with the requirements of the law in relation to distilled spirits. The breach laid is that Dair unlawfully removed from his distillery eight thousand two hundred and fifty gallons of distilled spirits, otherwise than into a bonded warehouse.

Dair and his sureties, William F. Davison and Abraham Briggs, all plead separately. And the government demurs to all the pleas except two pleas of general *non est factum* filed by the sureties.

Dair files but one plea. It seems to be intended as a traverse of the breach of the condition of the bond charged in the declaration. It is substantially as follows: that it is untrue that he removed eight thousand two hundred and fifty gallons of distilled spirits from his distillery, otherwise than into a bonded warehouse; that it is untrue, as is alleged in the declaration, that there is due to the plaintiff sixteen thousand five hundred dollars for taxes unpaid upon spirits distilled by Dair; but that, on the contrary, the number of gallons of distilled spirits unlawfully removed by him is less than is stated in the declaration, and the amount of taxes unpaid on spirits unlawfully removed by him is less than that stated in the declaration.

This plea is so obviously and outrageously bad, that it deserves no consideration by the court. It looks very much like a sham plea. The demurrer to it is sustained; and an interlocutory judgment on it against Dair will be rendered.

Davison, one of the sureties, has filed three pleas—a general plea of *non est factum*, and two special pleas of *non est factum*. To the two last there are demurrers.

The first of these special pleas of *non est factum*, avers

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that Davison signed the bond when it was in blank as to the names of the other obligors; that he signed it at the request of one William F. Sanks, on his assurance that it should be executed by one James Dair before it should be delivered to the obligee; that said James Dair never executed it; and that Davison never would have signed it, but on condition that said James Dair should also sign it.

This plea is an attempt to show that, as to Davison, the instrument is a mere escrow. But this it fails to do. To make the instrument such, the plea ought to have averred that the supposed bond was delivered to some third person to be delivered to the obligee only on the performance of the condition pleaded. For want of such averment, the plea is bad, and the demurrer to it is sustained.

The second special plea of *non est factum* filed by Davison is like the first, except that it adds that "said supposed writing," after he signed it, "was left with said William F. Sanks as an escrow, to be delivered by him to the plaintiff's agent in case the same was so afterwards executed by James Dair, and not otherwise."

This is a good plea to show that, as to Davison, the supposed bond is a mere escrow, and not his deed. It shows a signing and delivery to a stranger to be delivered to the obligee only on the performance of a condition precedent, which it avers was never performed. If the facts thus pleaded are true, it is certain that the instrument sued on is not the deed of the defendant Davison. Demurrer overruled.

The defendant Briggs has filed four pleas, to the second, third, and fourth of which there are demurrers.

The second of these pleas is substantially the same as the plea of the principal obligor, Jonathan M. Dair, which we have already considered. And for the same reason on which that plea is held bad, the demurrer to this is sustained.

The third and fourth pleas of Briggs are copies of the second and third pleas of Davison, already discussed; and the ruling on them must be the same. The demurrer to the third

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plea of Briggs is therefore sustained; and the demurrer to his fourth plea is overruled.

If there be anything specific or particular in the thing to be performed, though consisting of a number of acts, performance of each must be particularly stated. 3 Chitty on Pleading, 985; n. (a.) 1 do., 429. For authorities holding that under the plea of *non est factum* evidence is admissible that the deed was delivered to a third person as an *escrow*, see 1 do., 424; Puterbaugh's Pleading and Practice, Common Law, (Illinois, 3rd Ed.) 391; 2 Greenleaf on Evidence, §300, and cases cited.

Consult also *United States vs. Samuel H. Hammond et al.*, following case.
—[Reporter.

THE UNITED STATES vs. SAMUEL H. HAMMOND
et al.

CIRCUIT COURT.—DISTRICT OF INDIANA.—JANUARY, 1869.

1. BOND—PLEADING—CONDITIONAL DELIVERY.—In a suit on a distiller's bond against him and his sureties, one of the sureties pleaded that he signed the bond and delivered it to the principal obligor on condition that it should not be delivered to the obligee till it was signed by one B; that said B never signed it; that the agent of the obligee, when he accepted and approved the bond, had notice of said conditional delivery; and that so the writing was not the surety's deed. *Held*, that as to the surety, the writing was a mere escrow, and that the plea was good.

2. TRAVERSE.—The condition of the bond was that the principal obligor, a distiller, should faithfully comply with all the requirements of law in relation to distilled spirits. And the breach laid was that the principal obligor, having manufactured one thousand gallons of spirits at his distillery, had sold and removed for sale the same therefrom without first paying the taxes thereon as required by law. Plea, that he did not sell or remove for sale said spirits or any part thereof without having first paid the tax thereon as required by law. *Held*, a good plea on general demurrer.

McDONALD, J.—This action is debt on a distiller's bond, conditioned for his faithful compliance with all the requirements of the law in relation to distilled spirits. The breach assigned is, that, having manufactured at his distillery one thousand gallons of spirits, he sold and removed for sale the same therefrom without first paying the tax thereon as required by law.

Three pleas have been filed, to the second and third of which, there are demurrers. And the question for decision is, whether these demurrers should be sustained.

1. The second plea is a special *non est factum*. It is pleaded separately by Samuel F. Day, one of the defendants.

This plea alleges that at the time when Day signed the bond, the said Samuel H. Hammond, the principal in the bond, "promised to procure the signature of one James M. Bratton to said bond as co-security thereon; that the same was delivered to said Hammond for the purpose of getting the said Bratton's signature thereto, and not for the purpose of being delivered by said Hammond to the plaintiff until the said Bratton had signed the same; that at the time said Hammond delivered said bond to the plaintiff, the plaintiff had full notice that said bond was not to be delivered by the said Hammond until it was signed by the said Bratton"; that one William Bickell was then and there a deputy collector of the district in which Hammond's distillery was situate, and was "the agent of the plaintiff to accept and approve said bond; and that when said bond was tendered to him for his acceptance by the said Hammond, the said Hammond stated to the said Bickell, agent of the plaintiff as aforesaid, that said Day had signed said bond on condition that the same was not to be delivered until the said Bratton had signed the same."

No oyer of the bond is of record; so that we cannot see whether, in the form in which it was approved, anything on its face indicated that it was then in an imperfect condition.

It is certain that the obligor of a bond cannot deliver it to the obligee on any condition so as to make it a mere escrow.

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A delivery to the obligee estops the obligor to say that it is not his deed.¹

It is equally clear that an instrument signed and sealed, and delivered to a stranger to it, on condition that it shall not be delivered to the obligee till the happening of some designated event, is a mere escrow till that event happens.²

But the case at bar differs from the case above supposed. Here the delivery by Day was not a delivery to the obligee of the bond, nor a delivery to a mere stranger to the bond, but a delivery to the principal obligor of the bond. And the question is, will such a delivery on a condition render it a mere escrow till the condition be performed? On this question the authorities are very numerous and very conflicting.

If the plea did not aver that, at the time of the delivery of the bond to the government, the plaintiff had notice of the conditional delivery by Day to Hammond, I should have felt more difficulty in pronouncing it a good defense. Though, even in that case, there are high authorities for holding that the plea would be good.³

But as the plea stands, I feel no difficulty in pronouncing it a good bar to this action.

There is, indeed, a class of cases which hold that a delivery of a bond by one obligor to another on a condition can never make it an escrow, but is equivalent to a delivery of it to the principal. Of this class are the cases *Taylor vs. Craig*, 2 J. J. Marshal, 449; *Bank of The Commonwealth vs. Curry*, 2 Dana, 143; *Smith vs. Moberly*, 10 Ben. Monroe, 266. And the case of *Deardorff vs. Foresman*, 24, Indiana, 481, seems to go almost to the same extent.

But I think that the weight of authorities is strongly

¹ *Foley vs. Cowgill*, 5 Blackford, 18; *Moss vs. Riddle*, 5 Cranch, 351.

² 2 Blackstone's Commentaries, 807; 4 Kent's Commentaries, 454.

³ *Pepper vs. The State*, 23 Indiana, 399; *The People vs. Bostwick*, 39 New York, 445.

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against the doctrine maintained in these cases. Even the case of *Deardorff vs. Foresman*, *supra*, while it seems to hold that a delivery by a surety to his principal co-obligor on a condition can in no case make the bond an escrow, admits that if the officer who approves the bond, was at the time aware of the condition remaining unperformed, the bond is void as to such surety.

Whatever conclusion ought to be drawn from decisions on this point made by courts of the several states, I consider that the Supreme Court of the United States has settled the question, and that its authority binds me.

In *Paroling vs. The United States*, 4 Cranch, 219, it was held that a surety might deliver to the principal obligor a bond as an escrow. In that case the names of other sureties were in the body of the bond; and the surety, when he so delivered it, declared, not in the presence of the officer accepting and approving it, but in the presence of his co-obligors, that he acknowledged the instrument, "but others are to sign it." Under such circumstances, it was held that a jury might well find that the instrument was a mere escrow till the "others" had signed it.

In the case of the *United States vs. Leffler*, 11 Peters, 86, which was an action on a collector's bond, one of the sureties had been permitted to prove on the trial that he "had executed the bond on condition that others would execute it, which had not been done." And this was held to be right.

So in *Johnson vs. Baker*, 4 Barnewall & Alderson, 440, before the execution of a composition deed, it was agreed in the presence of the surety to it, that it should be void unless all the creditors executed it. The surety thereupon signed it, and it was delivered to one of the creditors to obtain its execution by the other creditors, which never was done. And it was held to be a mere escrow.

So, also, in *Leaf vs. Gibbs*, 4 Carrington & Payne, 466, where a person signed a note with a representation that others were to sign it, who never did, it was held that the party

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signing it was not liable on it, unless he subsequently waived the signing by others.

The demurrer to the second plea is overruled.

The third plea avers that the said Hammond "did not, on the first day of July, 1868, or upon any other day, at said district or at any other place, sell or remove for sale one thousand gallons of distilled spirits or any other amount whatever, without having first paid the tax thereon, as required by law."

To this plea there is a special demurrer. The cause assigned is that it "does not sufficiently traverse the breach assigned in the declaration; the said traverse being in general terms, and not a particular traverse of each assignment of breaches."

It is difficult to see what this special cause of demurrer means. There is but one breach assigned in the declaration; and this plea negatives that breach in its very words. The only objection that could be raised to this plea is that it may possibly be faulty as containing a negative pregnant. But the special cause of demurrer assigned would not reach this fault. Whether, if the plea were specially demurred to for this cause, it should be held bad, I need not inquire. I am satisfied it is good on general demurrer. In *Pullin vs. Nicholas*, 1 Levinz 83, which was debt on a bond conditioned to perform covenants, one of the covenants was that the obligor should not deliver possession of certain premises to any but the obligee, or such person as should lawfully evict him. The defendant pleaded that he "did not deliver the possession to any but such as lawfully evicted him." On demurrer, this plea was held good. This case is cited and approved in Stephen on Pleading, 383; and it seems to be in point on the plea under consideration.

The demurrer to the third plea is overruled.

Consult *United States vs. Jonathan M. Dair, et al.*, preceding case.

For a full discussion of the plea of *non est factum*, and delivery in *escrow*, consult, *Foy vs. Blackstone*, 81, Illinois, 538; *Furness vs. Williams, Administrator*, 11 do., 229; *Neely vs. Lewis*, 5 Gilman, 81; *Price vs. Pittsburgh, Fort Wayne & Chicago R. R. Co.*, 34 Illinois, 18; *White vs. Bailey*, 14 Connecticut, 275; *Coe vs. Turner*, 5 do., 92; *Carr vs. Hoxie*, 5 Mason, 80; *Jackson vs. Rowland*, 6 Wendell, 666.—[Reporter.

Vogler vs. Spaugh.

JOHN VOGLER vs. ROBERT SPAUGH *et al.*

CIRCUIT COURT.—DISTRICT OF INDIANA.—JANUARY, 1869.

CONFISCATION — PLEADING — PAROL EVIDENCE — CONTRADICTING OFFICER'S RETURNS. — Assumpsit on a note for \$1010, executed by Robert Spaugh, Thomas Essex, and John Essex to the plaintiff. Plea, non-assumpsit. The defendants offered in evidence a record of the United States District Court for the District of Indiana, showing a confiscation proceeding and sentence against the plaintiff concerning a note described therein as a note of \$1000, executed to him by Robert Spaugh and John Essex, and showing that the last-named note had been seized by the marshal under proper process, confiscated by the court, and sold on a *renditioni exponas* by the marshal. The defendants offered to prove by parol that the latter was the same note sued on in this action. And the plaintiff offered to prove by parol that the marshal's return that he had seized the note was false; and that the charge against him of aiding and abetting the rebellion, on which the sentence of confiscation is founded, was untrue.

Held, that the plaintiff could not contradict the marshal's return by parol evidence;

Held, that the plaintiff could not contradict said record by proving that he never aided or abetted the rebellion;

Held, that parol evidence was inadmissible to prove that the note confiscated is the same note on which this suit is founded;

Held, that the said record of confiscation is conclusive upon the parties to this action as to all facts alleged in it;

Held, that, under the evidence in the case, the plaintiff was entitled to recover the amount of his note and interest.

Hendricks, Hord & Hendricks, for plaintiff.

M. M. Ray, for defendants.

McDONALD, J.—This case is submitted to the court for trial without a jury, pursuant to the 4th section of the act of March 3, 1865.¹

¹ 18 U. S. Statutes at Large, 501.

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The action is assumpsit on a promissory note. Plea, the general issue.

The plaintiff produced in evidence the note sued on. It is as follows:

"1010.

HOPK, February 18, 1859.

One day after date we or either of us promise to pay John Vogler or order one thousand and ten dollars, for value received, waiving all valuation and appraisement laws of the state of Indiana.

ROBERT SPAUGH.

THOMAS ESSEX.

JOHN ESSEX."

The defendants produced in evidence a record of the District Court of the United States for the District of Indiana, purporting to be a proceeding by the Government against "one promissory note for one thousand dollars, and John Vogler." By this record it appears that a libel in the name of the United States was filed in said court on the 30th of April, 1863, charging that John Vogler was then the holder of a note for one thousand dollars, executed to him by Robert Spaugh and John Essex "*some time since*," that "said John Vogler was a person guilty of aiding and abetting an armed rebellion against the Government of the United States;" and that said note had thereby become forfeited to the Government, under the provisions of the act of Congress of July 17, 1862.¹ The libel prayed process, &c.

On the same day process on said libel was issued to the marshal. This process, after reciting the facts set forth in the libel, commanded the marshal "to attach the said note, and to detain the same in his custody until the further order of the court."

On the 2nd of May, 1863, the marshal returned this process with the indorsement, that he had "arrested the property within mentioned," and had made the proper citation, &c.

At the same time a summons in said cause was duly issued and served on Robert Spaugh and John Essex.

¹ 12 U. S. Statutes at Large, 589.

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On the second day of June, 1868, Spaugh appeared to said action, and made oath in open court, that said note was made by him for borrowed money, on the 18th of March in the year 1859, or 1860, and signed by said John Essex; and that two hundred dollars ought to be credited on the note.

The record shows that, on due proclamation being made, June 6, 1863, a decree by default was rendered to the effect that "said note for the sum of one thousand dollars was forfeited to the United States; that a *venditioni exponas* should issue to the marshal, commanding him to sell at auction "said one-thousand-dollar note, subject to said credit of two hundred dollars; and that the marshal, on such sale, should by certificate assign and transfer said note to the purchaser."

The record also shows that a writ of *venditioni exponas* was issued in pursuance of said decree; and that by virtue thereof the marshal, on the 16th of September, 1863, sold the note for seven hundred and fifty dollars to one David Long.

The defendant, Robert Spaugh, testified, that the note sued on was executed by him as principal, and by the other defendants, Thomas Essex and John Essex, as his sureties; that it is the only note he ever gave the plaintiff; that he was summoned in said confiscation case, and answered to that proceeding by attorney; that he was not present when the marshal sold the note under said decree of confiscation; that he furnished to James A. Butler seven hundred and fifty dollars, who with that sum procured one Long to bid off the note for Spaugh at the marshal's sale, which money Long paid on said bid, taking the marshal's receipt therefor; that he had no part in setting on foot said confiscation proceedings, and had no hand in it except as aforesaid; and the plaintiff is an old man, and is uncle to Spaugh.

The plaintiff then produced Mr. Biglow as a witness, who testified that, during the pendency of all said confiscation proceedings he was deputy, to the marshal of the District of Indiana; that, as such, he performed all the marshal's duties in those proceedings; and that no actual seizure or pos-

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session of said note was ever made or had by said marshal or by any of his deputies at any time.

The deposition of the plaintiff was then read in evidence. In this deposition the plaintiff says that he is eighty-five years old, and has resided in North Carolina all his life; that said note was given for borrowed money, and was delivered to him about the time of its date, and was constantly in his actual possession in said state till the fall of 1867, when he sent it to Indiana for collection; that about the close of the rebellion, he heard that the note had been confiscated; that he had no other notice or knowledge of the pendency of any proceedings against him for that purpose; that he gave no voluntary aid to said rebellion; that he paid such taxes as he was compelled to pay, and none others; that from charitable motives, and with no view of aiding the rebellion, he furnished some provisions to confederate soldiers; that he fed and gave more victuals to Union soldiers, than ever he did to confederate soldiers; and that he was an old Henry Clay Whig, and was utterly and heartily opposed to secession and the late rebellion.

By several other depositions, the plaintiff abundantly proved that he gave no aid to the rebellion, but was utterly opposed to it, and was a good Union man throughout the late war.

All this evidence, except the note itself, was given under objections, with the understanding that the court should disregard so much of it as should be deemed inadmissible.

The principal question in this case is whether the facts thus proved are a bar to this action. And this involves three subordinate questions: 1. Is the evidence offered to contradict the marshal's return in said confiscation proceeding admissible? 2. Is the evidence offered to contradict the allegations in said libel charging that Vogler aided and abetted the rebellion admissible? 3. Is the evidence offered to prove the identity of the note sued on with the confiscated note admissible.

I. Is the evidence offered to contradict the marshal's returns in the confiscation case admissible?

The plaintiff insists that an actual seizure by the marshal of the note was indispensable to the jurisdiction of the court pronouncing the sentence of confiscation. As this point is now before the Supreme Court, and as I think the present case does not turn on it, I shall leave it undecided.

The marshal's return in the confiscation case, as shown by the record, expressly states that he had "arrested" the note. This, I think, is equivalent to saying that he had taken actual possession of it. And the question is, Can his return be contradicted in this collateral way? It is certain that in an action against a marshal for a false return, it might be contradicted by parol evidence. Such a return, however, when made becomes a part of the record, and has the same force and sanctity as any other part of it. Upon general principles, therefore, the marshal's return cannot be collaterally contradicted by any party to the record. He is estopped by it on the well-known rule that records estop parties and privies. This doctrine has been so often declared as to need no lengthy discussion.¹

Indeed, as said confiscation case was a proceeding *in rem*, it may well be questioned whether the record does not estop, as well all men, as parties and privies.²

On the whole, I think it clear that the evidence tending to contradict the marshal's return is inadmissible.

II. Is the evidence offered to contradict the allegations in said libel charging that Vogler aided and abetted the rebellion admissible?

By the record in the confiscation case, it appears that Vogler was legally notified of the pendency of that proceeding; that, on due proclamation made, he was defaulted; and that,

¹ *Hamilton vs. Matlock*, 5 Blackford, 421; *Burger vs. Becket*, 6 do., 61; *Remington vs. Henry*, Id., 63; *Lines vs. The State*, Id., 464; *Purrrington vs. Loring*, 7 Massachusetts, 388; *Townsend vs. Olin*, 5 Wendell, 207.

² 1 Greenleaf on Evidence, §525.

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on hearing evidence, the court regularly pronounced sentence of confiscation. These proceedings necessarily involved a decision that Vogler had aided and abetted the rebellion. On what principle Vogler, who was regularly a party to these proceedings, can now come forward and, in this collateral way, contradict this record, it is difficult to see. What I have said about contradicting the marshal's return, equally applies to this question. Whether Vogler aided and abetted the rebellion, is *res judicata*. The record pronounces that he did. And that he cannot collaterally and by parol evidence contradict that record, is too well settled to admit a doubt.¹

III. Is the evidence offered to prove the identity of the note sued on with the confiscation note admissible? In other words, from all that is before me, must I conclude that the note in suit has been confiscated in the proceeding *in rem* referred to?

In the confiscation proceeding, the note is described as "a note of one thousand dollars, executed some time since" by Robert Spaugh and John Essex to John Vogler. The note in suit, as we have seen, is a note for one thousand and ten dollars, dated February 18, 1859, executed by Robert Spaugh, Thomas Essex, and John Essex, payable to John Vogler or order one day after date. *Prima facie*, these are not one and the same note. Robert Spaugh swears that the instrument in suit is the only note he ever executed to John Vogler. And the defendants insist that, from this evidence, I ought to conclude that the notes are identical; and that consequently the plaintiff cannot recover. If this premise is right, the consequence must inevitably follow.

But is it true that, from this evidence, I must conclude that the note confiscated and the note in suit are one and the same? I think it is not. I think I am bound to conclude

¹ Hopkins *vs.* Lee, 6 Wheaton, 109; Miles *vs.* Caldwell, 2 Wallace, 85; Supervisors *vs.* United States, 4 do., 435.

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that they are distinct and different notes. I suppose that I cannot permit that any parol evidence shall contradict the confiscation record. By a comparison of the note in suit with that record, it appears that the note sued on is for one thousand and ten dollars; and that the confiscated note was only for one thousand dollars; and that the former was executed by three persons, and the latter only by two. In all litigation the subject matter of the suit must be so described as to render its identity plain. Such description must be a part of the record; and it can no more be collaterally contradicted after judgment than any other part of the record. Suppose A sues B for land, and describes it as the south half of section one, and recovers judgment for it, can either of them afterwards be permitted to say that the suit was really for the north half of that section? In *Mahan vs. Reeve*, 6 Blackford, 215, where, in a partition proceeding, the land was described as section 28 instead of section 23, it was held that even a court of chancery, in a direct proceeding for that purpose, would not correct the mistake.

The general rule already mentioned touching the absolute verity of records, is the same, as applied to the correction of supposed mistakes in them, as to any other attempts to contradict them.

I must therefore hold that the note sued on is not the confiscated note. On this holding the whole defense falls; and I must find the issue for the plaintiff, and assess the damages at the amount of the note and interest.

The case referred to as pending in the Supreme Court, and which holds that the marshal must take the note into his actual custody and control, is *Pelham vs. Rose*, 9 Wallace, 103.—[Reporter.]

Buckingham vs. Jackson.

JAMES BUCKINGHAM, EXECUTOR, *et al*, vs. ANDREW JACKSON *et al*.

CIRCUIT COURT.—DISTRICT OF INDIANA.—FEBRUARY, 1869.

IN EQUITY.

BILL FOR ACCOUNTING—INTERPRETATION OF CONTRACT.

A, B, and C were the owners of a tract of land. They entered into a written agreement with J, in which it was stipulated that they sold him an undivided half of the land for \$5,299.40, to be paid in four years; that J should pay half the taxes on the land; that he should subdivide and sell it in parcels; that he should deliver to A, B and C the proceeds of said sales in payment of said \$5,299.40 till the same was fully paid; and that afterwards the proceeds of such sales should go, one-half to J and the other to A, B, and C.

Held, that till J had delivered over to A, B, and C double the amount of his said debt of \$5,299.40, he could not claim a division with them of the proceeds of subsequent sales.

Porter, Harrison & Fishback, for complainant.

Walter March, for defendant Jackson.

McDONALD, J.—This is a bill in equity for an account, founded on a written agreement concerning the purchase and sale of certain lands. The agreement is made an exhibit with the bill, and is as follows:

“Agreement made this 1st day of May, 1857, between Calvin Fletcher, Margaret McCarty, Susan McCarty, Margaret R. McCarty, and Francis J. McCarty, of the one part, and Andrew Jackson of the other part, *witnesseth*, that the party of the first part have sold to Andrew Jackson of the second part the undivided half of the following tracts of land: [Here the lands are described.] All supposed to contain, more or less, 249 40-100 acres (Andrew Jackson having heretofore taken

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by purchase fifty-hundredths for his mill-yard, and leaving the said 249 40-100 acres to the party of the first part), sell him the undivided half; and if the said Fletcher has heretofore, in laying off and selling lots in his addition to the town of Anderson, taken any portion off of said tracts, the same amount is to be taken off of his adjoining lots, so as to make up the full amount of the tracts above mentioned. For which undivided half, said Jackson is to pay the sum of \$42.50 per acre in four years from date without interest. And said Jackson is to divide and sell the said lands in such portions as he and the said Fletcher may agree; and as fast as the same is sold, return the money to the parties of the first part, unless sold on a credit, which shall be on interest, and the interest annually paid by such purchasers; and that interest is to inure to the benefit of the party of the first part, until the said Jackson, by sale, pays up the purchase money. Then, if there is a balance unsold, he shall have half the interest on the quantity of land left after paying up his purchase money. And as soon as moneys are paid by purchasers on time, the same shall go to and be handed over to the parties of the first part till the purchase money is, as aforesaid, paid by the said party of the second part for his undivided half. Then, after that is so paid, the residue unpaid shall go with the interest, one-half to each party. Deed to be made to the said party of the second part when the purchase money on his part is paid, to all that remains unsold, or for which obligations are outstanding to convey to others; the said party of the second part to pay one-half of the present and future years' taxes and assessments on said land. His services for sales are not to be accounted; but for extra expenses in laying off, in obtaining the services of a surveyor, and for all necessary traveling expenses, he is to be paid. He is to keep an account of all sales, moneys, &c., in the disposal of the lands, and to have an oversight of the same to prevent trespasses, as far as possible—is to receive and collect the notes given by the Kirbeys, and that sale to be considered as his own sale, and will be so accounted in the final

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settlement of this concern. It is understood that said Calvin Fletcher and Nicholas McCarty's heirs hold the foregoing tract of land in partnership with Solomon Sturges and Alva Buckingham, and are to account to them for the same. Said Jackson has this day given his note for the purchase money in accordance with this agreement. As witness the hands and seals, day and year first written. P. S. After the said party of the second part has paid the purchase money as above, he is to have a reasonable compensation, for his services in settling and collecting, out of the profits." [Signed.]

The cause has been put at issue by answers, a cross-bill, and replications; and it is now submitted for final hearing and decree. And the parties agree in open court that the final decree shall depend on the construction of the written agreement above copied. By the parties on one side it is contended that said agreement must be construed to mean that as soon as Jackson, by the sale of these lands, obtained and paid over to the party of the first part ten thousand five hundred and ninety-eight dollars and eighty cents undivided, that is to say, double the amount which he engaged to pay for an individual half of the lands,—then, after deducting his costs and expenses from the gross amount of all subsequent sales, the residue should be equally divided between the parties to the written agreement. On the contrary, Jackson insists that the agreement ought to be construed as meaning that whenever, by sales of the lands, he received and paid to the party of the first part five thousand two hundred and ninety-nine dollars and forty cents,—the amount which he engaged to pay for an undivided half of the lands,—then, after deducting his expenses from the gross amount of all subsequent sales, the residue should be equally divided between him and the other party to the agreement. And Jackson, on his part, and the other parties to this suit, agree in open court that if the court shall construe said written agreement according to Jackson's interpretation of it, then a decree shall be rendered in his favor for one thousand dollars; but that if the court shall

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construe the agreement according to the interpretation insisted upon by the other parties to this suit, then a decree shall go against Jackson for two thousand dollars.

The written agreement in question is a very remarkable document. It was evidently got up most carelessly. Some words, plainly intended to be inserted in it, seem to have been inadvertently omitted. It is a good illustration of the observation of Blackstone, that "The law rarely hesitates in declaring its own meaning; but the judges are frequently puzzled to find out the meaning of others."

The primary rule in the interpretation of contracts is that they must be interpreted according to the intention of the parties. In seeking for that intention, we must give to every contract a reasonable construction.¹ For it should not be presumed that the parties intended anything either senseless or absurd. In view of these rules, let us attempt to interpret the contract in question.

Some things in this contract are plain enough. It is plain enough that the parties to it intended a sale to Jackson of the undivided half of 249 40-100 acres of land, at forty-two dollars and fifty cents per acre, amounting in the aggregate, as they estimated it, to the sum of five thousand two hundred and ninety-nine dollars and forty cents; and that he executed his note for that sum, payable four years after date without interest. Furthermore, it is very clear from the terms of the contract that to the other parties Jackson should pay that sum. How he should pay it, is therefore the only question of any difficulty. Now, the written contract attempts to show, and I think does show, how he was to pay it. The contract plainly shows that Jackson was made the agent of all the parties to divide into parcels all the land held in common by them, and to sell and receive the pay for the same. The contract also plainly requires that all moneys so received by Jackson—

¹ 2 Kent, 554.

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whether on sales for cash down, or on principal or interest on sales on credit—shall be paid over to the other parties to the contract, “till the purchase money is * * paid” by Jackson, arising on his purchase. This is clearly meant. Now, it should be noted, that the contract does not say that *all* the moneys so to be received by Jackson, shall be delivered to the other parties in satisfaction of his debt to them, but only that he shall continue so to deliver these moneys till his debt to them is paid. How much of this money, then, would he have to pay over to them in order to extinguish his debt? That would depend on the rights of the different parties to this money. If it all belonged to Jackson, he would only have to deliver over to them the amount called for in the note—five thousand two hundred and ninety-nine dollars and forty cents. But did it all belong to him? It is the proceeds of land held in common and undivided by all the parties, in which Jackson held—at least equitably—one undivided half, and the other parties a like interest. Then only one-half of this money belonged to Jackson; and the other half to the other parties to the contract. How then could he pay his own debt with their money? Could such an absurdity have been within the intention of the contracting parties? The construction insisted on by Jackson involves this absurdity. I repeat that every contract must receive a reasonable interpretation. His interpretation I think is not reasonable; and I cannot adopt it. I think that there is no violence done to the words of the contract in construing it to mean that Jackson should continue to hand over to the other parties to the contract all the money he should receive on the sales which he engaged to make, till his half of it should be sufficient to pay the debt of five thousand two hundred and ninety-nine dollars and forty cents which he promised to pay. And I suppose this is the true construction of the contract in question.

It has been suggested, however, on the part of Jackson, that this contract, when all its provisions are duly considered, does not amount to a sale to him of any part of the land in ques-

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tion; that a suit could not be maintained on the note he executed; and that the whole thing amounts to no more than a special contract having in view a speculation in land. This suggestion may be right; but I do not perceive how it can help Mr. Jackson. I think it would make the case one of partnership. But whether it would or not, the substance of the matter would be this: The parties agree to enter upon a speculation in the sale of lands. All of them, except Jackson, put into the concern some ten or twelve thousand dollars' worth of land to be used in the speculation. Jackson puts in nothing; he only engages to pay half the taxes on the land, and to perform some services relating to the sale of it, and to pay the other parties five thousand two hundred and ninety-nine dollars and forty cents. And this money he engages to pay them out of the proceeds of sales of these lands. All this seems plain enough. But then the question recurs, Was he to pay this sum of money out of his share of the proceeds of these sales, or out of the whole of those proceeds? This is exactly the same question which meets us if we regard the case as a contract to sell an undivided half of the land to Jackson. Indeed, whatever view we take of the written agreement in question, we cannot escape the inquiry, Was Jackson to pay his debt of five thousand two hundred and ninety-nine dollars and forty cents out of his share of the proceeds of sales? I hold that this question must be answered in the affirmative. It was his debt; and his money ought to have paid it. This interpretation is not inconsistent with the words of the contract, and it escapes the absurdity of supposing the intention of the parties to have been that Jackson was to pay one-half of his debt with his creditors' money.

There is proof in this case to the effect that, at the date of the contract, the land in question was only worth from thirty-two dollars and fifty cents to thirty-five dollars per acre. And it is argued that as it is put down at forty-two dollars and fifty cents in the written agreement, this disparity ought to be considered in interpreting the contract. This disparity, how-

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ever, will not be deemed very considerable when we remember that Jackson's purchase of the land was on a credit of four years, without interest. But suppose, on the other hand, that Jackson's interpretation of the contract is right, he would then pay his debt of five thousand two hundred and ninety-nine dollars and forty cents with two thousand six hundred and forty-nine dollars and seventy cents of his own money. This would be all he really would pay for his undivided half of the land; for it is idle to speak of paying a debt to a creditor with his own money. It follows, therefore, that, on Jackson's interpretation of the contract, he would only pay twenty-one dollars and twenty-five cents per acre for the land. And this, certainly, would be farther below the value of the land, than forty-two dollars and fifty cents would be above it. It appears to me, consequently, that the evidence of the value of the land, so far from aiding Mr. Jackson, is rather against him.

On consideration of the whole matter, I entertain no doubt touching the proper interpretation of the contract under consideration. And I decree in favor of the complainants and against the defendant Andrew Jackson, two thousand dollars.

THE UNITED STATES vs. CHARLES WILLIAMS.

DISTRICT COURT.—DISTRICT OF INDIANA.—FEBRUARY, 1869.

INDICTMENT—PLEADING.

1. FELONIOUS POSSESSION OF FORGED NATIONAL BANK NOTES.—An indictment for the felonious possession of a forged national bank note need not aver that the forged instrument purported to be a note of any designated national bank, if the instrument be copied into the indictment, and if by the terms of such copy it purports to be such a note.

2. In an indictment for the felonious possession of a forged national bank note it is not necessary that the indictment should aver that the bank is a legal corporation. The national courts will judicially take notice of the existence of all national banks.

A. Kilgore, U. S. District Attorney, for the United States.

W. W. Leathers, for defendant.

McDONALD, J.—At the present term of the court, the prisoner was found guilty on an indictment for the felonious possession of a counterfeit national bank note. And he now moves in arrest of judgment on the ground of certain supposed defects in the indictment.

The indictment charges that, on the 30th of October, 1868, in the District of Indiana, the prisoner “unlawfully, feloniously, and knowingly did then and there have and keep in his possession, and conceal, with intent then and there to pass, utter, and publish as true to some person or persons to the grand jurors aforesaid unknown, one certain false, forged and counterfeit national bank note; which said false, forged, and counterfeit bank note is as follows, to-wit:

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O.	National Currency. This note is secured by bonds of the United States, deposited with the U. S. Treasurer at Washington. L. E. Chittenden, Register of the Treasury. F. E. Spinner, Treasurer of the United States. Philadelphia, Pa., March 7th, 1864. The National Bank of Philadelphia will pay twenty dollars to Bearer on demand. Samuel S. MacMattox, Cash'r.	A. 20. \$9,888.
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Wm. P. Hamm, Presd't.

with intent then and there thereby to defraud some person or persons to the grand jurors aforesaid unknown, he, the said Charles Williams, then and there well knowing the said national bank note to be false, forged and counterfeit, contrary to the form of the statute," &c.

The indictment contains a second count; but it is in all respects substantially the same as the one above copied.

1. It is objected to this indictment that it does not contain what is called "the purport clause."

It is common in charging felonies relating to forged bank notes, to allege that the forged instrument purported to be a note on a designated bank. And in indictments on statutes which employ this language, such an allegation may be necessary. But where no such language is found in the act on which the indictment is framed, it is, to say the least, more doubtful, whether the allegation is necessary. The indictment in question is founded on the 10th and 13th sections of the act of Congress of June 30, 1864.¹ The 10th section of this act, so far as it relates to the case at bar, simply provides that every person, who "shall have or keep in possession, or conceal, with intent to utter, publish, or sell, any false, forged, counterfeited, or altered obligation or other security of the United States," shall be punished, &c. And the 13th

¹ 18 U. S. Statutes at Large, 221, 222.

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section enacts that "the words 'obligation or other security of the United States,' used in this act, shall be held to include and mean all bonds, coupons, national currency," &c. In these sections there is not a word about forgeries *purporting* to be national currency or anything else. So far, therefore, as the language of the act on which the indictment is founded is concerned, there is clearly nothing in it requiring the insertion of the "purport clause" in the indictment.

Let us, then, inquire whether any principle in criminal pleading requires the insertion of the clause in question in describing a forged instrument in an indictment. It is a general rule that all the facts necessary to constitute the crime should be plainly stated, and that nothing else is requisite to a good indictment. In all indictments relating to forgery, the general rule is that the pleading must copy the forged instrument. The copy, therefore, being in the indictment and being part and parcel of it, speaks for itself. Of course, it *purports* to be what its language expresses. Thus in the present case, the copy set out in the indictment plainly purports to be a copy of a bank note executed by the National Bank of Philadelphia. On the face of the indictment, this is unquestionably the purport of the forged instrument. And the copy indicates its purport more certainly and satisfactorily than any mere allegation of its purport could possibly do. Of what use, then, could be an averment in the indictment that the forged instrument purported to be a national bank note? Certainly none at all.

I conclude, therefore, upon principle and reason, that in no case of an indictment describing a forgery and setting out the forged instrument *in hæc verba*, is it necessary to superadd the "purport clause."

In the forms given by Archbold of indictments for forging and uttering Bank of England notes, the "purport clause"

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is omitted.¹ And that the clause is unnecessary, seems to be the opinion of a learned American writer on criminal law.²

On the whole, I am satisfied that the omission of the "purpose clause" in this indictment does not vitiate it.

2. It is contended that the indictment in question is bad, because it does not aver that the national bank of Philadelphia is a body politic and corporate.

It is certain that the act of June, 1864, providing for the incorporation of National Banks, is a public act of which all courts must take judicial notice. But it is not so certain that courts must take judicial notice of the organization and incorporation of every national bank existing under that law.

If, in fact, there never existed any corporation known as The National Bank of Philadelphia, it is clear that the prisoner ought not to be punished under the indictment. For in that case he could not be guilty of the felonious possession of a forged national bank note, but only of the possession of a spurious note, against which there is no law. It should seem to follow, that unless this court can take judicial notice that what is called The National Bank of Philadelphia is a corporation under the act authorizing the incorporation of national banks, the indictment is bad for not averring that the National Bank of Philadelphia is a corporation under that act.

In the case of a public act incorporating a single designated body politic, there can be no doubt that courts must judicially take notice of the existence of the artificial person thereby created. But the case of the National Bank Act is somewhat different. It did not of itself create any corporation. It merely provided, under certain conditions, that an indefinite number of voluntary associations might become incorporations under that act. In the case of an act establish-

¹ Archbold's Criminal Pleadings and Evidence, 584, *et seq.*

² Bishop on Criminal Procedure, §481.

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ing a single corporation, however, its mere passage does not usually *ipso facto* create the corporation. To effect that there must generally be afterwards an organization under the act; and the thing does not become a body politic till such organization is complete. Now, if the act of Congress had only provided for the incorporation of one bank, no one would doubt that when such bank was fully organized, its corporate existence should judicially be noticed by all courts. Can the fact that the act provided for the organization and incorporation of an indefinite number of banks make any difference? I am inclined to think that it cannot. And I am the more strongly impelled to this conclusion by the consideration that the act puts all these national banks under governmental control and supervision; that their articles of association must be deposited among the national archives; that their capital consisting of registered bonds must be deposited with the Treasurer of the United States; that before the bank enters upon the transaction of business, a certificate of the Comptroller of the Currency, to the effect that the bank has fully complied with the provisions of the act so as to become a corporation, shall be published in the newspapers; that every such bank shall make quarterly reports to the Government; and that these banks may be made fiscal agents of the United States. In fine, the various and numerous provisions of the act providing for the incorporation of national banks indicate that they are to be regarded as public institutions of the existence of which all the departments of Government must officially take notice.

Therefore, as it is a rule that neither in civil nor criminal pleading is it necessary to allege any fact of which the court will judicially take notice, I conclude that no averment in this indictment of the existence of The National Bank of Philadelphia as a corporation was necessary.

The motion in arrest is overruled.

LEANDER WYMAN AND EPHRAIM MARINER

vs. JAMES J. RUSSELL *et al.*

CIRCUIT COURT.—DISTRICT OF INDIANA.—FEBRUARY, 1869.

IN EQUITY.

1. FORECLOSURE—LIMITATION.—As a general rule, mortgages cannot be foreclosed after the lapse of twenty years from the date when the cause of action accrued.

2. SALE UNDER ATTACHMENT.—Under the statutes of Indiana of 1838, in a proceeding in foreign attachment where there was only constructive notice to the defendant, and where he did not appear to the action, no personal judgment could be rendered against him. In such a case, the judgment should have been simply for a sale of the property attached. And the only writ that could issue on such a judgment was a *venditioni exponas*. A sale on a *feri facias* issued on such a judgment is void.

3. RECORDING MORTGAGE.—Under the Indiana Code of 1838, a neglect to record a mortgage within the prescribed time did not invalidate it, except as to a subsequent *bona fide* purchaser or mortgagee whose deed or mortgage was first recorded.

4. EFFECT OF EXTENSION ON NOTE.—A mortgage was made in 1838, to secure notes which on their face all fell due in nine months thereafter. A suit to foreclose this mortgage was commenced in 1860. On each note the mortgagees indorsed an agreement to delay the collection of the notes for three years from the date of the mortgage. But these indorsements were not referred to in the mortgage, nor recorded. *Quære*, did this engagement thus indorsed on the notes, as between the mortgagee and innocent purchaser, take the case out of the operation of the Indiana statute of limitation of twenty years?

5. PARTIES.—In a proceeding to foreclose a mortgage, all persons holding the equity of redemption of the lands or any part thereof must be made parties.

6. BURDEN OF PROOF.—In a suit by assignees of a note and mortgage, if the assignment is denied it must be proved.

Porter, Harrison & Fishback, for complainants.

M. M. Milford, and *McDonald & Roach*, for defendants.

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MCDONALD, J.—On the 11th of September, 1860, the complainants, Wyman and Mariner, filed their bill in this case against the defendants, Samuel J. Russell and Lucy his wife, Erastus Bond and Mary his wife, Charles W. Thomas and Elizabeth his wife, Benjamin Loboek and Mary Ann his wife, Samuel Finny and Elizabeth his wife, Joseph Pool and Rachel his wife, Samuel Haller and Sarah his wife, David Neal and Lucinda his wife, Isaac Coleman and Rachel his wife, Jonathan Shideler and Sarah C. his wife, and Othniel Williams.

The bill charges that in 1838, the defendants, Russell and Gilbert, partners, executed to Rayner and Pond of New York three notes, payable respectively in five, seven, and nine months, in the aggregate sum of two thousand seven hundred and fifty-three dollars and sixty-five cents, which have never been paid; that to secure the payment of these notes at the end of three years, Russell and wife, on the 13th of April, 1838, executed a mortgage to Rayner and Pond on divers designated tracts of land in Fountain county, Indiana, and on certain lots in the city of Milwaukee, which was recorded in Fountain county, Indiana, in 1841; that afterwards Rayner and Pond assigned the notes and mortgage to one Eldred, who, on the 11th of July, 1860, assigned them to the complainants; that no proceedings have ever before been instituted to collect them; that the defendants, Bond and wife, Thomas and wife, Finny and wife, Loboek and wife, Pool and wife, Haller and wife, Neal and wife, Coleman and wife, and Shideler and wife, “have, or claim to have, some interest in said mortgaged premises, as purchasers, incumbrancers, or otherwise; but such interest, if any, is subsequent to the mortgage.”

The bill prays a foreclosure of the mortgage.

Bond and wife, and Thomas and wife, Finny and wife, Loboek and wife, and Shideler and wife have filed a joint answer to the bill. It substantially denies the material allegations of the bill. These defendants, in this answer claim title to separate portions of the land in Fountain county. And

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they aver that, on the 28th of April, 1838, in the Fountain Circuit Court, Isaac Coleman and Samuel Coleman commenced a proceeding in foreign attachment against said Samuel Russell, and one John F. Russell, William E. Russell, Henry Russell, Othniel Gilbert, James B. Stewart, John Pierson, James Smith, Joseph Wright, and David K. Knight; that the writ of foreign attachment in that case was on the same day levied on said lands in said county; that in September, 1839, said court rendered judgment in favor of the plaintiffs in that proceeding for one hundred and twenty dollars and twelve cents, and costs; that thereupon an execution on that judgment was issued to the proper sheriff, commanding him to sell the attached lands; and on the 14th of December, 1839, the sheriff sold the same on that execution to said Isaac Coleman and Samuel Coleman for one hundred dollars; that on the 3rd of September, 1844, the sheriff made to the purchasers the proper deed on said sale, who on the 12th of May, 1845, conveyed the same lands to one William Baldwin, Elias Butler, and Lewis C. Wilson for one thousand six hundred and forty-eight dollars, "under whom these defendants hold, and claim title, to said lands as innocent purchasers for valuable consideration"; that the notes in question, as they appear in the record of the mortgage, were due more than twenty years before the commencement of this suit, and therefore these defendants plead the statute of limitations; and that all the persons under whom these respondents hold said lands were, equally with the defendants, innocent purchasers, and together with them have, ever since the 14th of December, 1839, been in the quiet possession of these lands, and have made valuable improvements on them, without the assertion of any claim to them under the mortgage, and therefore the defendants insist that the complainants' claim is stale and inequitable, and should not be allowed.

To this answer there is a general replication.

The defendant, Russell, has filed an answer admitting the facts stated in the bill.

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The cause is now submitted for final decree on the bill, answers, exhibits, and evidence.

The mortgage and notes are in evidence; and in all respects the bill describes them correctly. The mortgage appears to have been acknowledged December 9, 1838, and recorded in Fountain county, April 5, 1841.

On the back of each of the notes, there is the following indorsement:

"For value received, we hereby agree to defer the payment of the within note three years from this date, interest being paid annually. Dated April 13, 1838.

RAYNER & BOND."

But these indorsements, though of the same date as the mortgage, are not referred to in it, nor recorded.

The defendants produce in evidence an authenticated transcript of the attachment proceedings referred to in their answer. And it proves substantially the averments in the answer relating to those proceedings. By this transcript it appears that the Fountain Circuit Court ordered a sale of the attached lands. But neither the writ under which the sale was affected, nor the sheriff's return thereto, appears in the transcript. The clerk who made the transcript, however, certifies thus: "Which said execution and return appear to have been lost—which said execution by the records of the court was issued for said sum of one hundred dollars and twelve cents, and fifteen dollars and ninety-eight cents, costs accrued."

The sheriff's deed to the purchasers under his said sale is also in evidence. It is dated September 3, 1844. After reciting the judgment in attachment, as above stated, this deed says that a writ on said judgment was issued to the sheriff commanding him that, "of the goods and chattels, lands and tenements of the" defendants in the attachment suit, "found in his bailiwick he should cause to be made the judgment," &c. Thus the deed describes a *fieri facias*, and not a *venditioni exponas*. Indeed, this conveyance and the transcript taken together plainly indicate that the writ was a common *fieri*

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facias. Moreover, this deed makes no reference to the writ of foreign attachment; and by its terms it would seem that the lands were sold *in solido*, and not in parcels.

The respondants, by divers deeds of conveyance, unnecessary to be here particularly noted, prove a chain of title from the purchasers at the sheriff's sale down to them. And I see no defect in this chain of title if the first link in it—the sheriff's deed—is valid. Still, allowing for the present that it is, the question would remain, which lien should prevail, that of the attachment proceeding or that of the mortgage? The mortgage was executed on the 13th of April, 1838; and the suit in foreign attachment was commenced April 28, 1838. The mortgage lien was therefore the older.

But was this older lien defeated by the failure to record the mortgage till April 5, 1841? At that time, the Indiana statute provided that mortgages should be "recorded within ninety days after the execution thereof;" and, if not so recorded, that they should "be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration" unless such mortgage should "be recorded before the proving and recording of the deed under which such subsequent purchaser or mortgagee may claim."¹ Now, the mortgage in question was recorded before the sheriff's deed was executed. It is plain, therefore, that the omission to record the mortgage till 1841 would not, under this statute, defeat its priority over a sheriff's deed which was executed in 1844. Therefore the neglect to record the mortgage in time is of no avail to the defendants.

But, even if the sheriff's deed had been recorded before the mortgage was, it could not defeat the mortgage, unless it was a valid deed. To make it such, it must be supported by a valid judgment and a valid execution.²

¹ Code of 1858, 312.

² *Armstrong vs. Jackson*, 1 Blackford, 210.

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In this case, there was a valid judgment. The transcript, indeed, shows that there was a personal judgment for one hundred and twenty dollars and twelve cents; and this was undoubtedly void; because it was rendered in a proceeding in foreign attachment, by default on a mere newspaper notice, against defendants who were not residents of the state, and who never appeared to the action. But another portion of that judgment is valid, namely, so much of it as ordered a sale of the lands which were attached. On this order a proper writ might undoubtedly have been issued. But what was the proper writ? certainly not a *feri facias*. Beyond question, the only proper writ was a *venditioni exponas*. Was the writ on which the sheriff made the sale in question a *venditioni exponas*? Unfortunately the writ is lost. But the sheriff's deed describes no such a writ. As we have already seen, both it and the transcript describe a *feri facias*. And an agreement between the parties on file admits that "said writ and sheriff's return thereof are substantially in accordance with the facts recited in the deed." According to this the sale was made under a *feri facias*; and it was therefore void; and the deed was and is consequently void.

But, though the respondents are not entitled to claim anything under the sheriff's deed, still is not the staleness of the complainants' demand such that a court of equity ought not to decree in their favor?

The mortgage was executed April 13, 1838. On its face, it purports to have been made to secure three notes then existing, and falling due respectively in five, seven, and nine months. On the face of the mortgage, therefore, it would seem that all these notes were due on the 13th of January, 1839. The bill was filed September 11, 1860, more than twenty-one years after the debt was due. To meet this difficulty, the complainants insist that, by the indorsements on the notes already referred to, they really did not fall due till the end of three years after the execution of the mortgage; and therefore the statute of limitations did not begin to run against

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their claim till January 13, 1842. Possibly this fact saves the case from the operation of the statute of limitations; though I doubt it. Perhaps it might as between the holders of the mortgage and the makers of it; but it is more questionable as between the holders and the respondents, who were ignorant of the agreement to extend the time of the payment of the notes, and who appear by the evidence to have purchased the land in good faith, and to have been long in quiet possession of it and made valuable improvements on it. However, in 1862, under my predecessor in office, so much of the answer as sets up as a defense, the lapse of time was excepted to by the complainant as being an improper way of setting up the bar of the statute of limitations. The judge then sustained the exception and ordered the part of the answer thus excepted to to be stricken out. It has not indeed been expunged; but I think I must not regard it as a part of the answer. But this is not very important in view of other points hereafter to be considered.

It is in evidence that the lands in question, since the mortgage was made and before the commencement of this suit, have passed through many hands, been subdivided into small lots, and sold to divers purchasers, who for many years past have occupied them as their own and improved them; and that several of these purchasers, though within the jurisdiction of this court, have not been made parties to this suit. Certainly they are necessary parties. And till they are made parties the complainants cannot have a decree of foreclosure. In such a case, the court might indeed order the case to stand over till all the necessary parties are brought in. But, as no motion to that effect has been made, and as there is a fatal objection to a decree for the complainants resting on the insufficiency of the evidence, I will not of my own motion make such an order.

The complainants sue as assignees of the notes and mortgage in question. The answer denies the assignments of them. Under these circumstances the burden devolved on the com-

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plainants to prove the assignments as alleged in the bill. On this point there is no evidence whatever. And this circumstance is fatal to a recovery by the complainants.

The bill is dismissed without prejudice at the complainants' costs.

Where creditors have allowed the statute to run against their debts, it runs also against the security for the debt; and where the creditors for whose benefit an assignment was made delay asserting any claim to the trust funds until the debts intended to be secured are barred by the statute, it becomes the duty of the trustee, after such lapse of time, to refuse to pay the debts, and a court of equity will refuse to enforce the trust. *Gibson et al. vs. Rees et al.*, 50 Illinois, 384.

For the general statement of the doctrines of limitations to mortgages, consult 2 Washburn on Real Property, 174 3d Ed. The purchaser from a mortgagor may avail himself of the statute in the same manner as the mortgagor might have done. *McCarthy vs. White*, 21 California, 495; *Coster vs. Brown*, 23 do., 142; *Lord vs. Morris*, 18 do., 482.

The period from which the statute begins to run is the breach of the condition of the mortgage. *Rodman vs. Hedden*, 10 Wendell, 498; *Powell vs. Smith*, 8 Johnson, 249; *Odlin vs. Greenleaf*, 3 New Hampshire, 270.

In case of judgment by default, only constructive notice being had on the defendant, the property attached is alone liable. *Conn vs. Caldwell*, 1 Gilman, 531; *Boswell vs. Dickerson*, 4 McLean, 262. And a special execution will, in Illinois, issue for the sale of the attached property. But if the defendant appear or is served, the judgment is *in personam*, and the plaintiff can have an execution generally and also a special one for the sale of the property. *Conn vs. Caldwell, supra*.

The general rule is that all persons interested in the mortgaged property, are necessary parties to a suit of foreclosure, and this includes all entitled to redeem. 1 Daniell's Chancery Pleading and Practice, 212, *et seq.*

At common law an indorsee of a promissory note is bound to prove the indorsement in the ordinary mode like any other handwriting, and that it was made by the person by whom it purports to have been made, and when the indorsement is special, that the indorsee is the person described in it. 8 Phillips on Evidence, 189. And in Illinois, where by statute the assignee in an action upon an assignable instrument is not bound to prove the assignment or signature unless they are put in issue by a verified plea, the statute is held to apply only to cases where the declaration is upon the instrument. When it is offered in evidence under the common counts the common law rule still obtains. *Hall vs. Freeman*, 59 Illinois, 54.—[Reporter

Park Bank *vs.* Nichols.

NATIONAL PARK BANK OF NEW YORK *vs.*
JOSHUA R. NICHOLS *et al.*

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH,
1869.

1. CORPORATIONS—WHEN MAY SUE IN FEDERAL COURTS.—A corporation which has a legal existence in any one state, can sue in the federal courts of any other state. It is not necessary that it be a corporation created by the laws of that state.

2 CITIZENSHIP OF CORPORATORS.—It is a presumption—which the courts will not allow to be rebutted—that if a corporation has a legal existence in a state, its corporators are citizens of the same state.

Assumpsit to charge the defendants as partners in the Butterfield Overland Despatch Company, on indebtedness of the company. The facts are fully stated in the report of the trial before Drummond, J., Vol. 2 of this Series, 146.

This was a motion to dismiss for want of jurisdiction.

Charles Hitchcock, Wirt Dexter, Corydon Beckwith, and Geo. C. Bates, for the motion.

S. A. Goodwin and I. N. Arnold, contra.

DAVIS, J.—It is objected that the Park Bank cannot sue in this court, because it is not a corporation created by the laws of the State of New York. So far as the right to sue is concerned, it can make no difference that the bank is authorized by Congress instead of the legislature of New York. If it is created by law, has its lawful place of business in New York and nowhere else, and its corporators are citizens of the state, it can bring a suit in any circuit court of the United States outside of the State of New York. This was substantially decided by Chief Justice Marshall in the *Bank of the United*

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States vs. Deveaux, 5 Cranch, 61, but he held that it was a matter of proof whether all the corporators of the Bank of the United States lived in the State of Pennsylvania. This doctrine has been modified, and it is now held by the Supreme Court to be a presumption which cannot be rebutted, that if the corporation has a legal existence in the state, its individual members are citizens of the state.¹

There is no question but the Park Bank was authorized by Congress to transact business in New York and nowhere else, and it therefore follows, as a legal presumption, that the shareholders of the bank are citizens of New York. If so, this suit can be maintained.

Motion denied.

A corporation created by the laws of the state in which a suit is brought in the Federal Court, must be considered a citizen of that state, whatever its status or citizenship is elsewhere by the laws of other states. *Chicago & Northwestern Railway Co. vs. Whiton*, 18 Wallace, 270, S. C.; 4 Chicago Legal News, 181.

A corporation created by and transacting business in a state, is to be deemed an inhabitant of that state, capable of being treated as a citizen, for all purposes of suing and being sued in a circuit court. *Louisville, Cincinnati, &c., R. R. Co. vs. Letson*, 2 Howard, 497; *Marshall vs. Baltimore & Ohio R. R. Co.*, 16 do., 814; *Greeley vs. Smith*, 8 Story, 76; *New York & Erie Railroad vs. Shepard*, 5 McLean, 455.

A municipal corporation created by a state within its own limits may be sued in a circuit court, by a citizen of another state, *Owles vs. Mercer County*, 7 Wallace, 118. And the state legislature cannot prevent the jurisdiction of the Federal Courts from attaching. *Id.*

A national bank organized and located in any state, may sue a citizen of another state in the circuit court thereof. *Manufacturers' National Bank vs. Baack*, 2 Abbott's U. S. R. 282; S. C.; 8 Blatchford, 137.—[Reporter.

¹ *Ohio and Mississippi R. R. Co. vs. Wheeler*, 1 Black, 286.—Reporter.

In re Valentine.

In re WILLIAM H. VALENTINE.

DISTRICT COURT.—DISTRICT OF INDIANA.—MARCH, 1869.

IN BANKRUPTCY.

PROOF OF CLAIM BY CREDITOR—FULL NAMES.—In proving a claim against the estate of a bankrupt by a creditor, founded on a note made to him by the name of A. G. Wallace, the first Christian name of the creditor ought to appear in the documents offered in evidence, or in the record of the proceeding; and it is not sufficient that the initials of the creditor's Christian name alone appear.

Eben W. Kimball, for creditor.

MCDONALD, J.—One A. G. Wallace, before Register Ray, offered proof and prayed allowance of a claim on the estate of the bankrupt. The claim consisted of a note of five hundred dollars, alleged to have been executed by the bankrupt to Wallace. The note on its face purports to have been made by W. H. Valentine to A. G. Wallace, using the initials of the Christian names only. In this form the note was shown in evidence to the register. There was no allegation on paper and no evidence offered as to the full Christian names of either of the parties to the note. And for the want of this, the register refused to allow the claim. To this, Wallace excepted; and the case comes before me on the register's certificate touching this ruling.

It is a primary rule, subject to few exceptions, that in judicial proceedings, whenever it is necessary to refer to persons, the Christian names of such persons must be stated in full. Where, however, the person has two Christian names, it is enough to state the first in full. This rule is particularly applicable to the names of parties to actions. The reason of the rule is that all persons with whom courts are concerned in

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litigation ought to be identified; and a statement of their full Christian and surnames is the most satisfactory method of identifying them.

In this state, even in a justice's court, it is not sufficient to state merely the initials of the Christian names of the parties.

If the present case had been an action of assumpsit by the payee against the maker of the note in question, no lawyer would doubt that the full Christian names of both parties should be stated in the pleading. The same reason for requiring this in that case, applies equally to the present proceeding. So far as concerns parties to legal proceedings, whether they be adverse or *ex parte* proceedings, I think the reason of the rule is equally applicable. And I know no case in which any person applying to any court of record for any kind of relief or redress, is not bound to give at least one full Christian name as well as his surname. Indeed, the ancient common law deemed it more important that the full Christian name should be stated than the full surname.

The decision of the register is approved.

The pleadings should set forth the Christian and surnames of all parties, plaintiff and defendant, and also of others of whom mention is made in the pleading. Stephen on Pleading, 302.

The full names of the parties should be stated. *Hay vs. Lanier*, 3 Blackford, 322; *Livingston vs. Harvey*, 10 Indiana, 218. But the omission of the Christian name of the plaintiff in the statement of a claim against a decedent's estate, is only matter in abatement, and the objection may be obviated by amendment. *Peden's Administrator vs. King*, 30 do., 181. A middle name or initial is no part of a man's name, and its insertion or omission is immaterial. *Edmundson vs. The State*, 17 Alabama, 179; *McKay vs. Speak*, 8 Texas, 376; *King vs. Hutchins*, 8 Foster, 561; *Allen vs. Taylor*, 26 Vermont, 599; *State vs. Manning*, 14 Texas, 402; *Thompson vs. Lee*, 12 Illinois, 242; *Erskine vs. Davis*, 25 do., 251; *Betch vs. Johnson*, 45 Illinois, 116; *Isaacs vs. Wiley*, 12 Vermont, 674; *Games vs. Stiles*, 14 Peters, 322.

The words "Junior" or "Senior" are no part of a man's name. *Coit vs. Starkweather*, 8 Connecticut, 289; *The People vs. Cook*, 14 Barbour, 259; *Headley vs. Shaw*, 39 Illinois, 354. Where there are two of the same name it will be presumed that the elder is meant, unless otherwise shown. *Bate vs. Burr*, 4 Harrington, 180.

It has, however, been held that a single letter may be presumed to be an

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entire Christian name. *Tweedy vs. Jarvis*, 27 Connecticut, 42; and Lord CAMPBELL, CH. J., has held that "Lee B." and "I. H." might be the Christian names and not merely initial letters. *Regina vs. Dale*, 5 English Law and Equity, 860.

The courts can take judicial notice of the abbreviation of a man's name. *Lenton vs. Perkins*, 8 Mississippi, 144. If one is in the habit of using only initial letters for his Christian name, a declaration against him by that name is good. *City Counsel vs. G. W. King*, 4 M'Cook, 487; *Wood vs. Buckley*, 18 Johnson, 486.—[Reporter.

In re JOHN G. KING.

DISTRICT COURT.—DISTRICT OF INDIANA.—APRIL, 1869.

IN BANKRUPTCY.

ATTORNEY'S FEES ALLOWED PETITIONING CREDITOR.—In a case of involuntary bankruptcy, the creditor on whose petition the debtor is adjudged a bankrupt, and who pays his attorney a reasonable fee for prosecuting the proceeding, is entitled to receive the amount so paid out of the assets of the bankrupt before a dividend is made among the creditors. But he is not entitled to such preference for time and money spent in travelling to and from the court, and in attending it during the trial of the case.

Rand & Hall, for petitioning creditors.

McDONALD, J.—This case comes before me, on a register's certificate, under the 6th section of the Bankrupt Act.

It appears that Henry K. Hobbs and Joseph W. Parks filed in this court a petition against the bankrupt, King, charging him with divers acts of bankruptcy, and praying an adjudication accordingly. On this petition he was adjudged a bankrupt. To effect this, they employed and paid Messrs.

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Bowles, Rand & Hall, who, as their attorneys, prosecuted the case. When the time came for distributing the assets of the bankrupt's estate among his creditors, they applied to Register Ray to allow them, as costs in the case to be paid out of the assets before a dividend should be made among the general creditors, two hundred and fifty dollars for the fees so paid to said attorneys, and fifty dollars for money and time spent by them in attending the trial of said case and in travelling to and from court for that purpose. Other creditors of the bankrupt appeared before the register and objected to said claims. There does not appear to be any dispute touching the amount of these charges. But the opposing creditors insist that they ought not to be allowed to any amount; and this is the only point certified for my decision.

On this question the Bankrupt Act is silent. If, therefore, the claim can be allowed, it must be on general principles as applicable to the act.

Proceedings in bankruptcy are in the nature of equitable proceedings. Indeed, in adjudicating in bankrupt cases, we have occasion much more frequently for the application of equity principles than of common law rules. Equity loves equality. In contests between creditors touching the estate of their debtor it seeks to do what natural justice demands. And to this end courts of equity have often ordered that costs of suits, including solicitor's fees, should be paid out of a common fund before that fund is distributed to the parties interested in it.

One leading object of the Bankrupt Act is to put all the honest creditors of an insolvent debtor on an equality. To effect this it even goes farther than equity jurisprudence goes. For it will not suffer a failing debtor to give any preference to one of his creditors even before proceedings in bankruptcy are commenced; and it pronounces all such preferences fraudulent.

But if the fees of counsel in cases of involuntary bankruptcy are not to be paid out of the common fund, the cred-

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itors who obtain against the debtor the adjudication of bankruptcy would not be put on an equality with the other creditors. The creditors prosecuting the debtor to bankruptcy would be in a worse condition than the others by at least the amount of their attorney's fees. To cast all the expense and trouble on them, and then require them to share equally with creditors who have sustained no expense or trouble, would be unjust. We must not thus "muzzle the ox that treadeth out the corn." *Qui sentit commodum sentire debet et onus.*

Moreover, the rule insisted on by the opposing creditor would in many cases be outrageously inequitable. Suppose such a case as this: A owes B, C, and D, each five hundred dollars, and commits an act of bankruptcy. B petitions against him for an adjudication of bankruptcy, and obtains it; but in effecting this he has to pay his lawyer one hundred dollars. The bankrupt's assets to be distributed amount only to three hundred dollars. Now, if this sum should be equally divided between B, C, and D, B would be merely re-imbursed the one hundred dollars which he paid his lawyer, and would not save a cent by the proceeding, and would virtually lose his whole debt of five hundred dollars, while C and D would respectively receive one-fifth of theirs without any expense in money. Thus, B would sow and C and D would reap. I am not willing to adopt a rule which would result in effects and consequences so unjust and absurd. And on general principles of equity, as well as in view of the spirit of the bankrupt law, I think that, in cases like the present, a reasonable attorney's fee ought to be paid out of the general fund before distribution to the creditors. The creditor who prosecutes the debtor to bankruptcy is not indeed entitled to pay extravagant fees to his attorney, and then claim re-imbursement out of the general fund. The amount of the fee must be reasonable. Whether the amount claimed in the present case is reasonable, is not submitted for my decision. But I direct the register to ascertain what would be a fair compensation to

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Messrs. Bowles, Rand, & Hall for their services in the prosecution in question, and to order the payment of the same out of the general assets before distribution.

In this view of the case, I am supported by Judge Lowell of the District of Massachusetts and Judge McCandless of the Western District of Pennsylvania in decisions lately made by them.¹ And Judge Williams of the District of South Carolina has decided that, in a case of involuntary bankruptcy, "all creditors must contribute *pro rata* to the expenses of the suit"; and that "whether counsel fees shall be allowed, as well as the measure of such fees, rests with the court, and is a question addressed to its equity."

As to the claim of Messrs. Hobbs and Parks for money and time spent in attending the court, and in travelling to and returning from it, in the prosecution of King to bankruptcy, I am inclined not to allow it. I know of no precedent in favor of such claim. I think it would be establishing a bad precedent to extend the equitable rule above laid down so as to include any expenses except legal fees of officers and witnesses, and attorney's fees. I therefore direct the register to allow no part of the claim of fifty dollars set up by Messrs. Hobbs and Parks.

The rule in equity that a solicitor has a lien upon the fund recovered or realized, which must be satisfied before distribution among claimants, is well stated in 2 Daniell's Chancery Pleading and Practice, 1845-7; *Turwin vs. Gibson*, 3 Atkyns, 720. Consult also *Barnesley vs. Powell*, Ambler, 102; *Owett vs. Simpson*, 16 Vesey, 275.

The reasonable expenses incurred by the petitioning creditor in the prosecution of the petition may be allowed out of the fund. *In re Schwab*, 2 Bankruptcy Register, 155.

But no allowance can be made to the petitioning creditor for his time and services. *In re Mead*, 28 Legal Intelligencer, 277.

As to what is an allowance of reasonable counsel fees, is considered in the following cases: *In re Williams*, 2 Bankruptcy Register, 27; *In re Moser and Mitteldorfer*, 3 do. 1.—[Reporter.]

¹ *In re Walte and Crocker*; 2 Bankrupt Register, 141; *In re O'Hara*; 8 American Law Register, N. S. 113.

In re Robert K. Dunkerson & Co.

In re ROBERT K. DUNKERSON & CO.

DISTRICT COURT.—DISTRICT OF INDIANA.—APRIL, 1869.

IN BANKRUPTCY.

DISTRIBUTION OF ASSETS—PARTNERSHIP DEBT.—The partnership debts of the bankrupts far exceeded the partnership property, but the individual assets of the partner D. exceeded his individual debts. D. had been a member of another firm of B. & D. which owed the E. N. Bank some \$16,000. The bank proved this debt under the proceeding in bankruptcy of D. & Co., and insisted that the surplus of the assets of D., after satisfying his individual debts, should be added to the general assets of the firm of D. & Co.; and that out of the fund thus composed of the assets of both D. and of the firm, the bank should take a dividend equally with the creditors of the firm.

Held, that the mode of distribution thus claimed by the bank could not be allowed.

Held, that the proper mode of distribution in this case is as follows:

1. That the individual assets of D. must first go to pay his individual debts in full.
2. That the joint assets of D. & Co., must be distributed *pro rata* to the creditors only to whom the firm was jointly liable.
3. That the individual assets of D., after satisfying in full his individual debts, should be distributed, *pro rata*, among all the creditors who have proved their claims in the proceeding, and to whom D., at the time of the filing of the petition in bankruptcy, was liable, either as a member of the firm of D. & Co., or of any other firm.

Asa Iglehart, for Evansville National Bank.

A. G. Robinson, for assignee.

MCDONALD, J.—This case comes before me on a certificate of Charles H. Butterfield, Esq., register for the Evansville District. His certificate is as follows:

“ This question arises upon the distribution of the assets in said matter, and embraces two classes of liabilities. One class

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embraces paper upon which the firm of R. K. Dunkerson & Co. is liable; and the other embraces paper upon which R. K. Dunkerson is liable, not individually, but as a member of the firm of Brown & Dunkerson, which last-mentioned firm was dissolved some years before the bankruptcy.

"The Evansville National Bank has proved in this case the following described notes, to wit: One promissory note drawn by Thomas E. Johns, Archie Baugh, and Joe C. Jones, and indorsed by Given, Watts & Co. and Brown & Dunkerson—amount \$5,006.30. Also three other notes, each for the sum of \$5,000, drawn respectively by E. Warfield, Watt F. Johnson, and J. D. Vance, and each indorsed by Given, Watts & Co., and by Brown & Dunkerson—said last-mentioned firm being composed, at the time of said indorsements, of William Brown and Robert K. Dunkerson, one of the petitioners in this matter. Upon these notes, R. K. Dunkerson is the only member of the firm of R. K. Dunkerson & Co. who is liable—his liability arising out of his connection with the firm of Brown & Dunkerson.

"In the distribution of the assets belonging to the firm of R. K. Dunkerson & Co. and the assets belonging to the individual members of said firm, the assignee insists that the dividend shall be made in the following manner, to wit: 1. The individual debts of R. K. Dunkerson shall be paid in full out of his individual assets. 2. The assets belonging to the firm of R. K. Dunkerson & Co. shall be distributed, *pro rata*, among all the creditors of R. K. Dunkerson & Co. who have proved their debts. 3. The individual assets of R. K. Dunkerson, remaining after paying his individual debts in full, shall be distributed *pro rata*, among all the creditors proving their claims, to whom R. K. Dunkerson was liable at the time of filing his petition in bankruptcy either as a member of the firm of R. K. Dunkerson & Co., or of the firm of Brown & Dunkerson.

"To this the Evansville National Bank objects, and insists that, after paying Dunkerson's individual debts, the surplus

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of his individual assets shall be merged in the assets of the firm of R. K. Dunkerson & Co.; and that said bank shall be allowed a dividend upon the amount of the notes above described out of the assets of the firm of R. K. Dunkerson & Co. after the individual assets of Dundkrson, left after paying his individual debt, shall have merged as aforesaid, the same as upon the amount due said bank from the firm of R. K. Dunkerson & Co."

That when a debtor is jointly liable as a partner and separately liable as an individual, partnership property must first go to the payment of the partnership debts and his individual property to the payment of his individual debts, is too well settled to admit argument or to require the citation of authority. In the present case it seems that the separate property of Dunkerson far exceeds his separate liabilities; and that the partnership property of the bankrupts, Dunkerson and Co., is far less than their partnership liabilities. It follows, therefore, that all the individual debts of Dunkerson must be fully paid out of his individual property; and that all the partnership assets of Dunkerson & Co. must be applied, so far as they will go, to pay the partnership debts. This conclusion, I think, nobody will dispute. And, if in this I am correct, the only point to be decided is, whether the said claim of the Evansville National Bank is a debt due by the partnership firm of Dunkerson & Co. This it clearly is not. It is true that the debt due to the bank is a partnership debt; but it is due by the old firm of Brown & Dunkerson. This firm does not appear to have been declared a bankrupt. If it had, no doubt this debt due the bank ought to be paid *pro rata* out of the assets of that firm. But, so far as the firm of Dunkerson & Co. is concerned, the claim of the bank, beyond all doubt, is not a partnership debt, and is not entitled to any dividend out of the assets of that firm.

The mode of distribution insisted on by the national bank would, therefore, be plainly improper and unjust.

I fully agree with the register in his conclusion, that the

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individual debts of R. K. Dunkerson must first be paid in full out of his individual assets; that the assets of the bankrupts, Dunkerson & Co., shall be distributed *pro rata* among all their creditors who have proved their debts; and that the individual assets of R. K. Dunkerson, after first satisfying in full his individual debts, shall be distributed *pro rata*, among all the creditors who have proved their claims in this case, and to whom R. K. Dunkerson was, at the time of the filing of the petition in this case, liable either as a member of the firm of Dunkerson & Co. or of any other firm. And I direct that the register make the distribution accordingly. And I further order and adjudge that the Evansville National Bank pay the costs of this proceeding.

For full authorities as to the method of marshaling assets for payment of partnership and individual debts, consult *In re Knight*, Vol. 2 of this Series, 518; *In re Bradley, Id.*, 515; *In re Dunkerson & Co.*, ante p. 253; *In re Wm. H. Wiley*, ante p. 171.—[Reporter.]

UNION IRON COMPANY vs. WINSLOW S. PIERCE
et al.

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY, 1869.

1. **DEBT**—will lie upon a penal statute; it lies whenever the obligation is to pay a sum certain, or which may be readily rendered certain, whether the liability arises on simple contract, legal liability, specialty, record or statute.

2. **INDIVIDUAL LIABILITY OF CORPORATORS**.—When the charter of a corporation provides that where its officers shall neglect to make and publish certain reports required, they shall be individually liable for all corporation debts contracted while they are officers or stockholders; and when, while they were such, they were guilty of such neglect, and in the mean time the corporation became indebted to the plaintiff by note,—*Held*, that he might maintain an action of debt therefor against such delinquent officers.

3. **REPORTS OF OFFICERS**.—Where the charter of a corporation required its officers annually, between the first and 20th of January, to make and publish a certain report,—*Held*, that a company incorporated in May, 1867, was bound to make and publish such report in the following January.

4. **DECLARATORY LAWS**,—as such, are unconstitutional. They may operate as future rules on subsequent transactions; but, as constructions of prior laws, they are utterly void. The state legislature has no power to construe a statute previously enacted—such construction, as to acts done, is solely for the judiciary.

5. **REPUGNANT STATUTES**.—When two statutes of different dates are repugnant, the latter repeals the former to the extent of such repugnancy.

6. **REPEAL—EFFECT ON PENDING SUITS**.—Actions on statutes in their nature penal, pending at the time of the repeal of such statutes, cannot be further prosecuted after such repeal.

MCDONALD, J.—This is an action of debt. A general demurrer is filed to the declaration; and whether the demurrer ought to be sustained, is the question to be decided.

The declaration sets up a claim under an “individual liability” clause of the Indiana statute for the incorporation of

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manufacturing and mining companies.¹ The 13th section of that act provides that every company incorporated under it "shall, annually, within twenty days from the first day of January," make and publish a report in a newspaper of the county where the company is established, of the amount of its capital stock, debts, &c. And the 15th section of the act provides that, for any failure to make and publish the report required by the 13th section, all the officers of the company "shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof."

The declaration alleges that under said act, divers persons, among whom were some of the defendants, associated together, and, on the 22nd of May, 1867, became a corporation by the name of The White River Iron Company, and that the association fixed the number of directors at seven, and elected a board of directors accordingly, and chose therefrom a president and secretary. The declaration also avers that it was the duty of the officers of the corporation within twenty days from the first of January, 1868, to make and publish a report of the condition of the company, as prescribed by said 15th section of the act under which they were incorporated, and that they wholly neglected and failed to make and publish such report. It is further alleged in the declaration that on a note dated November 17, 1868, executed by said White River Iron Company to the plaintiff for three thousand six hundred and fifty dollars, payable one day after date, in an action pending in the Court of Common Pleas of Marion County, Indiana, the plaintiff, on the 3rd day of February, 1869, recovered against said White River Iron Company a judgment for three thousand six hundred and ninety-six dollars and eighty-four cents, with costs,—which judgment remains unsatisfied; and that by reason of the premises an action has accrued to the plaintiff to recover of the defendants the amount of said judgment.

¹ Gavin & Hord, 425.

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In support of the demurrer, it is contended that the action of debt will not lie on the provisions of the statute above cited, under any circumstances; and that as the action has been misconceived the demurrer must be sustained. In support of this view it is said that this is a penal statute and the action it gives is consequently an action in form *ex delicto*. We do not understand that this consequence follows. We shall hereafter have occasion to inquire whether this is, in the technical sense, a penal statute. We think, however, whether it is such or not cannot settle the form of action to be adopted. For though it be regarded as a penal statute, this circumstance does not tend to prove that debt will not lie on the claim stated in the declaration. The action of debt lies in many cases on penal statutes. At common law, debt is a very extensive remedy. It lies on simple contracts and on specialties for the payment of money. It lies on judgments for money, and on legal liabilities; and it lies for penalties and other liabilities created by statute, requiring the payment of money, when the statute declares no other remedy, and where the amount of the liability is certain or may be readily rendered certain.¹ And we may lay it down as a general rule, that whenever the obligation is to pay a sum of money which, as to amount, is certain or may be readily rendered certain, whether the liability arises on simple contract, legal liability, specialty, record, or statute, the action of debt is a proper form of remedy.

But the defendants' counsel urge that by the 13th section of the act in question, the White River Iron Company were not bound to make and publish their report in January, 1868, as alleged in the declaration, because it had not then been a corporation for one whole year. They construe that section to require this only after the first year of the existence of the corporation. The language is that the officers "shall, annually, within twenty days from the first day of January, make

¹ 1 Chitty on Pleading. 110 111 119

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a report," &c. The word "annually" means every year. And the meaning undoubtedly is, that when a company becomes incorporated under this act, it must, whenever a January comes after such incorporation has been organized, make and publish the report in question. The case of *Garrison vs. Howe*, 17 New York, 458, is exactly in point on this question, and settles it against the demurrer.

But the Indiana Legislature in April, 1869, and after this suit was commenced, passed an act amendatory of said 13th section. And that amendment declares "That the word 'annually,' as used in section thirteen of said act, shall be construed to mean once a year after such company has been doing business at least twelve months." And it is urged that this legislative construction must govern us. There can be no doubt that the legislature intended, in passing this amendment, to assume the power to construe the 13th section of the act proposed to be amended; and it is equally certain that the Indiana Legislature can exercise no such power. The constitution of this state separates the powers of the state government into three departments—the legislative, the executive, and the judicial—and it prohibits each of these departments from exercising the powers conferred on either of the others. Now, to make a law is a legislative function, which no court can assume; and the construction of a law already made is a judicial act, which no legislature can constitutionally perform. The amendment in question is a judicial act in so far as it attempts to declare the meaning of the term "annually" as it occurs in the 13th section of the old act. This amendment may operate as a future rule on subsequent transactions; but it cannot operate retrospectively and on past events. It is a well-established rule of American jurisprudence, that all declaratory laws, as such, are unconstitutional.

But the first section of the act of April, 1869, is not declaratory. It provides that the 15th section of the act for the incorporation of manufacturing and mining companies shall "be amended to read as follows, to-wit: If any certificate or

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report made, or public notice given, by the officers of any such company, as required by this act, shall be false in any material representation; or if they shall fail to give such notice or make such report, and any person or persons shall be misled or deceived by such false report or certificate or on account of such failure to make such report, and damaged thereby, then all the officers who shall sign the same, knowing it to be false, or fail to give the notice or make reports as aforesaid, shall be jointly and severally liable for all damages resulting from such failure on their part while they are stockholders in such company."

This act was passed and took effect April 30, 1869. The present suit was commenced April 23, 1869.

Under these circumstances, the defendants contend that the first section of the amendatory act, above cited, repeals the statute on which this action is founded, and takes away the right of action which the plaintiff had at the time of the commencement of this suit. Two questions arise on this point, namely, 1. Does the first section of the act of April 30, 1869, repeal these provisions in the act of which it is amendatory which gave the right of action on the facts stated in the declaration? 2. If so, does the repeal defeat this action? We will examine these questions separately.

1. As to the repeal. We have already seen that the 15th section of the original act for the incorporation of manufacturing and mining companies provides that if the officers of any such company shall fail to make the report or give the notice required by the 13th section of that act, all the officers so failing shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof. We have copied above the first section of the act of April 30, 1869, which it is insisted repeals said provision of the 15th section of the original act, and on which the present action is founded. It is certain that said first section and said fifteenth section are utterly inconsistent. Each gives a different remedy; and the first section gives no remedy in the

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case made by the declaration. There is, then, such a repugnancy between the two that they cannot both stand. The amendatory act, indeed, contains no repealing clause. But that is undecisive of the point in question. It is too well settled to require the citation of authorities, that when there are two repugnant statutes of different dates, the latter repeals the former to the extent of the repugnancy. From the nature of the case, this must be so in all systems of jurisprudence. With us this rule has been so long and so well established that it has taken the form of a maxim—*Leges posteriores priores contrarias abrogant*. I conclude, therefore, that the act of April 30, 1869, repeals the 15th section of the original act for the incorporation of manufacturing and mining companies, so far as the latter gives an action merely for a failure to report and publish a statement of the condition of the company.

2. As the amendatory act repeals the law on which the plaintiff's claim is founded, does it destroy the right of action which that law gave?

It is well settled that the repeal of a penal statute defeats all actions for penalties under such statute pending at the time of the repeal, unless the repealing act, in terms, saves the right to prosecute pending suits.¹ A learned English writer says that "when an act of parliament is repealed, it must be considered—except as to those transactions passed—closed, as if it never existed."²

The following rules, taken from Smith on Statutes and Constitutional Law, pp. 895, 896, appear to me to be sound: 1. If the right acquired under a statute be in the nature of a contract, or a grant of power, a repeal will not divest the

¹Hunt vs. Jennings, 5 Blackford, 195; Yeaton vs. United States, 5 Cranch, 261; Stephenson vs. Doe, 8 Blackford, 509; Butler vs. Palmer, 1 Hill, (New York,) 824.

²Dwarris on Statutes, (Potter's Ed.) 160.

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interest acquired, or annul acts done under it. 2. If the legislature, *ex mero motu*, by a statute give a party property belonging to the state, the gift is not defeated by a repeal of the statute. 3. If a penal statute be repealed, after an act done in violation of it, the violator is not subject to punishment under it after the repeal. 4. The repeal of a statute, made in restraint of natural rights or the use of property, restores the privileges thus restrained. 5. Where a statute gives a right in its nature not vested but remaining executory, if it does not become executed before a repeal of the law, it falls with it, and cannot thereafter be enforced. An eminent English Judge says, "The effect of a repealing statute, I take to be, to obliterate the statute repealed as completely as if it had never passed; and that it must be considered as a law that never existed, except for the purposes of those actions which were commenced, prosecuted, and concluded while it was an existing law."¹

In view of these authorities, I think the question resolves itself into this: At the time of the commencement of this action, had the plaintiff such a vested right of recovery upon the facts stated in the declaration, as the legislature has no power to destroy?

What, in the legal sense, is a vested right, it is not easy to define. Perhaps as good a definition as can be given is, that it is a fixed, established right not liable to be defeated by any contingency. A fair construction of the act of April 30, 1869, requires us to conclude that the legislature intended to destroy the plaintiff's right of action in the case at bar. And the only point is, had the legislature the power to destroy it? If the defendants' liability arose out of a contract, the Constitution would protect the plaintiff's right against all legislation; and so the right would be a vested right. But the act on which the plaintiff's claim is founded is not in the nature of a con-

¹ *Keys vs. Goodwin*, 4 Moore & Payne, 341.

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tract; it is a statute highly penal. A New York statute contained a provision in the very words of the 15th section of the Indiana act for the incorporation of manufacturing and mining companies; and the court of appeals of that state held that statute not "simply a remedial one," but that the provision was "highly penal."¹ In an action brought for a penalty under the fugitive slave law, it was held that "as the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject matter. And, as the plaintiff had no vested right in the penalty, the legislature might discharge the defendant by repealing the law."² May we not, in the case at bar, with equal reason say that, as here, too, the plaintiff's right to recover depended entirely on the statute, its repeal destroyed that right? and if in that case it was not a vested right, how could it be so in this? The case of *The State ex rel. vs. Youmans*, 5 Indiana, 280, is very much in point on this question. There, the act of 1843 had provided that if any sheriff should "neglect or refuse to return any writ of execution to the court to which the same was returnable, on or before the return day thereof, he should be amerced to the amount, with interest and costs, due on such execution." Pending an action on this statute, it was repealed. The court held that the repeal destroyed the right of action, and said, "The act of 1843 clearly imposed on the sheriff a penalty. * * * It is true that if a party on a prior statute has acquired a vested interest, its subsequent repeal would not affect his rights. But that principle is not applicable to the case at bar; because in a penalty there can be no vested right until it has been reduced to a judgment. A mere penalty never vests, but remains executory."

These authorities seem to me to be decisive of the question under consideration.

¹ *Garrison vs. Howe*, 17 New York, 458.

² *Norris vs. Crocker*, 18 Howard, 420.

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But, on the part of the plaintiff, it is insisted that the Indiana legislature could not constitutionally pass the repealing act in question; because the constitution of Indiana declares that "dues from corporations other than banking shall be secured by such individual liability of the corporators, or other means, as may be prescribed by law."

This provision of the constitution evidently requires legislation on the subject to which it relates. And it requires such legislation as may fairly tend to secure dues owed by corporations. But it clearly vests a wide discretion in the legislature. It says that dues from these corporations shall be secured by such individual liability of corporators, or other means, as may be prescribed by law. If the legislature should adopt the policy of making the corporators personally liable, it leaves the legislature free to provide for enforcing that liability in any manner that may be thought best, and of course to alter the manner and extent of that liability at pleasure. But it does not require the legislature to adopt the individual liability policy. It only requires the adoption of that policy or such "other means," as may secure the corporation debts. The legislature therefore is not absolutely bound to adopt any individual liability law; and it would seem to follow that if it is adopted, it may at any time be altered or repealed.

Demurrer sustained.

By Act of Congress, Feb. 25, 1871 (16 U. S. Statutes at Large, 432) it is provided, "That the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.—[Reporter.]"

United States vs. Thomasson.

THE UNITED STATES vs. JOHN D. THOMASSON.

DISTRICT COURT.—DISTRICT OF INDIANA.—MAY, 1869.

1. PARDON REMITS MOIETY OF INFORMER.—Judgment for a penalty under the revenue laws was rendered against T.; at the same time it was adjudged that B. was entitled to a moiety of the judgment as the first informer. Afterward the President, by a pardon, remitted the whole penalty.

Held, that the pardon operated to remit the moiety adjudged to the informer, as well as to discharge the portion coming to the United States.

2. PROCESS STAYED.—If the pardon is issued after judgment for the penalty, the court may order a stay of proceedings and process.

Hanna & Knefler, for the informer.

Hendricks and McDonald, for defendant.

McDONALD, J.—This was an action of debt to recover penalties incurred under the Internal Revenue Law of June 30, 1864. The 41st section of that act gave a moiety of the penalties to informers.¹ Charles G. Berry was the informer in this case. At the May term, 1866, of this court, a judgment was rendered against the defendant for penalties amounting in the aggregate to fifteen thousand dollars,—one-half to the use of Berry, whom the court then ascertained and adjudged to be the first informer.

On the 19th of June, 1868, John D. Thomasson, one of the defendants, filed in this court a petition, setting forth the proceedings aforesaid, and stating that before any part of said judgment was paid, namely on the 2nd of April, 1867, the President of the United States, in due form, under his signature and the seal of the Government, executed to said

¹ 18 U. S. Statutes at Large, 289.

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Thomasson a full and unconditional pardon of said penalties and judgment. The petition makes profer of the pardon; and it prays that, because an execution on the judgment is threatened by the informer, this court may order a perpetual stay of any execution or other process on the judgment.

A demurrer has been filed to the petition; and the parties agree that, in deciding the demurrer, the complete record shall be regarded as before the court.

It is not disputed that the pardon, as pleaded, is a valid remission of all the interest of the United States in the judgment in question. But it is contended on the part of the informer that the pardon cannot affect his right to a moiety of the judgment. And it is agreed on all sides that the only question to be decided on the demurrer is, whether, after the rendition of the judgment, and after the court had adjudged a moiety thereof to the informer, the President could constitutionally by his pardon defeat the informer's right to that moiety.

The national Constitution declares that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." The exception in this provision, according to a well-established maxim of law, strengthens its application to all offenses not excepted; so that we can certainly say that there can be no offense against the United States, except cases of impeachment, over which the President has not an absolute pardoning power. The only difficulty, therefore, in construing this constitutional provision, is as to what are to be deemed "offenses against the United States" within its meaning. On first view, it might seem that these "offenses" only include crimes and misdemeanors. But it is well settled that the term includes much more. According to Judge Story, "the power of pardon is general and unqualified, reaching from the highest to the lowest offenses. The power of remission of fines, penalties, forfeitures, is also included in it." "Instances of the exercise of this power by the President, in remitting

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finer and penalties, have repeatedly occurred, and their obligatory force has never been questioned.”¹

According to this well-settled doctrine, it seems to be certain that the Constitution of the United States absolutely impowers the President to remit the whole of the penalties in the present case, and all other penalties incurred for offenses against the United States. Of this it appears to me there cannot be a doubt.

If, then, the President is clothed with this indisputable power by the Constitution, can Congress constitutionally, by any provision in acts providing for the infliction of penalties for offenses against the United States, in any respect or degree, limit or modify the constitutional power thus conferred on the President? To put the same question in another form, has Congress the power to alter, limit, or modify any authority positively and unconditionally bestowed on any officer of the national Government by the Constitution? It appears to me clear beyond all doubt that Congress has no such power; and that any act of Congress assuming such power would be manifestly unconstitutional and void. A high authority has declared that “no law can abridge the constitutional powers of the executive department, or interrupt its right to interpose by pardon in such cases.”² No lawyer would venture to assert that Congress could constitutionally limit the President’s exercise of the pardoning power within a specified period of time, or to persons resident within the United States. Congress alone can annex penalties, fines, and forfeitures to “offenses against the United States,” and may doubtless provide that any designated part, or the whole of such penalties, fines, or forfeitures shall go to common informers. But having done so, the national legislature is, as to these matters, *functus officio*. And it has no power to say that as soon

¹ Story on the Constitution, §1504, and note 4.

² Story on the Constitution, §1504.

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as his share has been adjudged to the common informer, that portion of the penalty, fine, or forfeiture is by legislation carried beyond the scope of the pardoning power. If such a thing can be constitutionally done, Congress might by evasive acts practically deprive the President of his whole pardoning power relating to fines, penalties, and forfeitures. Suppose, for example, that Congress should by act provide that in all cases of fines, penalties, and forfeitures incurred for crimes, misdemeanors and all other offenses against the United States, prosecuted either by indictment or penal action, the whole of the fine, penalty, or forfeiture shall go to the first informer, and shall, on the day on which he gives the information, become a vested right in him, so that the President shall cease therefrom to have the power to pardon the same. Under such circumstances, would any jurist hold that the President could not pardon the offense after the information had been given? And yet it would seem very clear that if Congress has no power to pass a general law of this kind extending to all cases, there is no power to pass a law limiting its operations to special cases. Indeed, the claim of the informer in the case at bar must proceed on a construction of the act under which the present case was prosecuted, which prohibits a presidential pardon of the claimant's moiety after it has been adjudged to him. The act might admit this construction, were it not for the constitutional provision touching pardons. But it seems to me that such a construction would make the act unconstitutional, and is therefore inadmissible. Without great violence to the words of the act, it is capable of two constructions. One is that Congress intended so to vest the right to the penalties in the informer by virtue of the judgment of the court in his favor as to destroy the presidential power of pardoning the offense. And this I understand to be the construction insisted on by the informer. The other construction of the act is that Congress meant to give a moiety of the penalty to the informer subject to the contingency of a presidential pardon, and that the in-

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former was not absolutely vested with the right to the moiety by virtue of the judgment in his favor, but only on the condition that the informer should have a right to the moiety if the President should never pardon the offense. In my opinion, this last construction is as fair and reasonable as the first, even if it was not required by the Constitution. Besides, it is a well-settled American rule of construing statutes, that when a statute is capable of two constructions, one of which would render it unconstitutional and the other of which is consistent with the Constitution, the latter construction shall be preferred. This rule is only an illustration of a more general rule, that in all cases of writings, whether contracts or statutes, the interpretation must if possible be so made *ut res magis valeat, quam pereat*. This rule is, I think, eminently applicable to the statute under consideration. If we construe it as intending absolutely to vest in the informer a moiety of the penalty by virtue of the judgment in his favor so as to destroy the power of the president to remit the whole penalty, we must necessarily hold the act unconstitutional. For we have seen that no act of Congress can limit, modify, or restrain the President's constitutional pardoning power. But if, on the other hand, we construe the act as only vesting a contingent interest in the informer, subject to be defeated by the President's pardon, we both sustain the validity of the statute and avoid a violation of the Constitution. I hold therefore that the latter construction is by far the preferable one.

I believe the question under consideration has never been decided by the Supreme Court of the United States. In the case *Ex parte Garland*, 4 Wallace, 333, the question, however, was alluded to; but it was not involved in the controversy. The point decided in that case related to the right of Garland to practice law in certain courts. And the learned judge who delivered the opinion of the court had occasion to inquire how far a presidential pardon had restored Mr. Garland to that right; and he said that in general the pardoning power of the

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President is unlimited, and then added: "There is only this limitation to its operation,—it does not restore offices forfeited, or property or interest vested in others in consequence of the conviction and judgment."¹ This remark is a mere dictum of the judge, entitled, indeed, to our respectful consideration, but certainly not binding on any of the national courts. If, by the phrase "property or interest vested in others," the learned judge meant property or interest absolutely and unconditionally vested, I should think he was right, if indeed there could be such a case connected with the question of the pardoning power; and I rather suppose it is just what he did mean. But if he meant to say, as is urged by the informer in the case at bar, that a judgment ascertaining the first informer in a penal action, and awarding to him a moiety of the penalty, takes that moiety out of the operation of the pardoning power, I must dissent from that view. For it is but saying that Congress, by giving to an informer a part of a penalty incurred by an offense against the United States, can limit and even defeat, *pro tanto*, the pardoning power conferred on the President by the Constitution. It is observable that in support of this dictum, the learned judge cites only some old English text-books, as Blackstone, Bacon, and Hawkins. On examining these authorities, I find they only maintain this doctrine, that the king cannot pardon "where *private* justice is principally concerned in the prosecution," nor in case of "offense against a popular or penal statute after information brought."² Now it is certain that the case at bar is not one "where private justice is principally," or even at all, concerned. It is a prosecution for a violation of the Internal Revenue Law. Nor is the act on which this suit is brought a "popular statute" in any sense in which the authorities cited employ that phrase. The English popular stat-

¹ 4 Wallace, 381.

² 4 Blackstone, 398, 399.

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utes were acts which provided penalties or forfeitures for certain offenses and provided that a part thereof should be to the use of any one who would prosecute the offender. The right to prosecute was given to everybody—to all the people—and hence these acts were called popular statutes. The informer carried on and controlled the prosecution. It was prosecuted in his own name. He was the only plaintiff. The declaration ran thus: "John Smith, plaintiff, who sues as well for our sovereign lord the king, as for himself in this behalf, complains," &c.¹ The informer was liable for costs; but the king was not liable. In such a case, it was reasonable that after the informer had incurred liabilities and made himself responsible for costs, the king should not be permitted to remit the penalty sued for.

On the contrary, prosecutions for fines, penalties, and forfeitures under our Internal Revenue Laws, are not "popular actions" in the English sense of that phrase. In the case at bar, and in like cases, the penalty must "be sued for and recovered in the name of the United States."² The informer is not a party to the action. The Government is the only plaintiff. The informer need not even be named in the declaration. And the whole thing is most unlike the popular actions mentioned in the English books. The fact, therefore, that the king could not remit the informer's share after a popular action was brought throws no light on the President's pardoning power.

The king's power arose from usage. It was not conferred by any written constitution, or supported by any act of parliament.

Courts, in construing the Constitution, have frequently resorted to English common law. Thus, the terms *ex post facto* law, *habeas corpus*, and the like, found in the Consti-

¹ 2 Chitty's Pleadings, 13.

² 13 U. S. Statutes at Large, 239.

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tution, are old technical terms of the English law; and we may very properly resort to that law for their meaning in defining the same terms as they occur in the Constitution. But we have no occasion to resort to England to define the pardoning power vested in the President. The Constitution defines it, and declares its meaning and extent. It extends it to all offenses against the United States, except in cases of impeachment. The power of the British sovereign to pardon offenses furnishes us no guide in determining the extent of the pardoning power of the President. In judging the former we look to that ideal thing called the British constitution; in judging of the latter we consult our national Constitution. Nor are the powers of the two on this subject identical. The President cannot pardon impeachable offenses; the king can. According to 4 Blackstone, 398, the king cannot pardon a common nuisance while it remains unredressed; but the President undoubtedly can whenever it is an offense against the United States.

We shall notice this matter further when we come to examine a late decision made by the Judge of the District of Kentucky, which seems to be wholly based on the English limitation of the king's pardoning prerogative.

It is very certain that the Supreme Court of the United States does not regard the case *Ex parte Garland, supra*, as settling the question now under consideration. For, in the later case of the *Armstrong Foundry*, 6 Wallace, 766, the question was before that court, and was left undecided. And the chief justice said, "We think it unnecessary to express an opinion at present in relation to the rights of the informer."

It has been urged in favor of the informer that his is a vested right; and that, therefore, the President could not remit the moiety in question. But this is begging the question. For if the power of the President to remit the whole penalty remained after the judgment was rendered, the informer had not a vested right, but only a right contingent on the exercise of the pardoning power.

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I find but one decision in the national courts directly bearing on the question under consideration. I allude to a decision made by Hon. B. Ballard of the Kentucky District, and published in the Internal Revenue Record of January 19, 1867. It was the case of the *United States vs. Harris*,¹ and it decides that "The federal executive has no constitutional authority to remit moieties adjudged to informers under the Internal Revenue Act of June 30, 1864." I have a very high opinion of the legal learning of Judge Ballard; and it is painful to be forced to differ on a constitutional question from a gentleman of so exalted a judicial reputation. The opinion, too, is very handsomely expressed, and sustained by a course of most ingenious reasoning. But it is wholly based on the English doctrine touching the king's pardoning power; and it must be confessed that the learned judge has numerous and high authorities for construing the pardoning power of the President by the pardoning power of the British sovereign. Nor do I perceive that the learned judge claims that, aside from British precedents, our national Constitution sets any other limitation to the President's pardoning power than the exception touching impeachments. His argument does not deny that the language of the Constitution is wide enough to comprehend moieties of penalties adjudged to informers; but he insists that it must not be construed to comprehend them, because the British king had no such power. With all deference, this seems to me to be a *non sequitur*. I repeat that in cases of technical terms, occurring in the Constitution and borrowed from English law,—such as bills of attainder, *habeas corpus*, *ex post facto* law, corruption of blood, impeachment and the like—it is very proper in defining them to look to the sense in which the English lawyers used them before the Constitution was adopted. But the present is not such a case. Here, indeed,

¹ 1 Abbott's U. S. Rep., 110.

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the technical word, "pardon," is employed. But we have no dispute about the meaning of that word. The dispute is whether the President may remit the whole penalty incurred "for an offense against the United States," after half of it has, under an act of Congress, been adjudged to an informer. And this question does not depend on the construction of any technical terms, but on the construction of the language of the Constitution, which declares that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." Here, the *Constitution* plainly declares, defines and limits the power. In its very terms it extends to all offenses against the United States—whether informers become interested in penalties incurred by these offenses or not—except only in cases of impeachment. And I repeat that the naming of this exception strengthens the application of the power to every case not excepted, on the rule that "enumeration weakens the application to things not enumerated, and exception strengthens the application to things not excepted."

I maintain, therefore, that in defining the extent of the President's pardoning power, we must look to the language of the Constitution, and not to the language of the British jurist touching the pardoning power of the king.

The Constitution provides that "Congress shall have power to lay and collect taxes." In order to judge of the extent of that power, would anybody institute an inquiry into the power of the British Parliament on the subject of levying and collecting taxes? Yet such an inquiry would be just as reasonable as to inquire into the king's pardoning power in order to judge of the extent of that of the President.

I think that the pardon in question is operative as to the entire penalty: and therefore I overrule the demurrer.

Noell vs. Mitchell.

LOUIS NOELL *et al.* vs. JACOB MITCHELL.

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY, 1869.

JURISDICTION—CITIZENSHIP.

The defendant executed a note to S. Strous or order. Strous indorsed it in blank, and then re-delivered it to the defendant, who thereupon delivered it to the plaintiffs. The declaration averred that it was an accommodation note, and that Strous never had any interest in it.

Held, that, under the 11th section of the Judiciary Act, the court has no jurisdiction of the case unless it appear by an averment in the declaration that Strous, as well as the plaintiffs, is a citizen of a state other than Indiana. But the rule is otherwise as to foreign bills of exchange, bills and notes payable to bearer, and suits by indorsees against their immediate indorsers.

Porter, Harrison & Fishback, for plaintiffs.

W. J. Hammond, for defendant.

MCDONALD, J.—This action is assumpsit on a promissory note. There is a demurrer to the declaration, which raises a question of the jurisdiction of this court to entertain the action.

The declaration avers that the plaintiffs are citizens of New York, and that the defendant is a citizen of Indiana.

The declaration charges that the defendant, by his note, promised to pay to the order of one Samuel Strous two thousand nine hundred and eighty-eight dollars and eighty-eight cents; that Strous indorsed the note in blank, and delivered the same thus indorsed to one Max Glazer, a citizen of New York; that Glazer thereupon delivered the note to the plaintiffs; and that "said Strous indorsed said note for the accommodation of the defendant, and never had any title to said note or property therein."

From these averments in the declaration, it is plain that the plaintiffs claim to derive title to the note through Strous and by virtue of his said blank indorsement. But it does not state the citizenship of the indorser.

By the 11th section of the Judiciary Act, no national court shall have "cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."¹

The only question, then, is this: From anything stated in the declaration, could Strous, the payee of this note, have maintained an action on it in this court against the maker, if he had never indorsed it? It is certain that he could not. There are two reasons why he could not. *First*, the declaration avers that he had no interest in the note; and, *secondly*, the declaration does not aver that Strous is a citizen of a state other than Indiana. This is so plain that no extended remarks need be made to support it.

Under the 11th section of the Judiciary Act, it is well settled that in the suits in the national courts by assignees of choses in action, such as notes, inland bills, &c., the declaration must allege the citizenship of all assignors through whom the plaintiff derives his title, as well as the citizenship of the plaintiff and defendant.

To the foregoing rule there are two exceptions; or rather there are two classes of cases not embraced by the 11th section of the Judiciary Act. The first are foreign bills of exchange. These the section in question expressly excludes from its operation. The second are notes and inland bills made payable to bearer. The reason of this exception is that the holder of such paper does not take it by assignment within the meaning of the section in question; but, in contemplation of law,

¹ 1 U. S. Statutes at Large, 79.

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he takes it directly from the party who, on the face of the paper, promises to pay the bearer; and as the plaintiff is the bearer, the promise is made directly to him, and he does not derive his title through an indorsement.¹

Nor is the case of an indorsee suing his immediate indorser within the operation of the section under consideration. For he does not sue on the note or bill, but on the indorsement.²

But as the case at bar falls within the general rule, and is not saved by any exception to it, the demurrer must be sustained.

That notes payable to bearer are not within the above exception to the 11th section, consult also *Wood vs. Dummer*, 3 Mason, 308; *Bonnafes vs. Williams*, 3 Howard, 574. Nor is a bail-bond, for it is but an incident to the original suit. *Bobyshall vs. Oppenheimer*, 4 Washington, 482. Nor a judgment recovered in a state court, though the original cause of action was a negotiable instrument on which the federal court would not have taken jurisdiction. *Dexter vs. Smith*, 2 Mason, 303.

The prohibition as to suits to recover the contents of any promissory notes or chose in action does not apply to an action of replevin to recover the instrument itself. *Deshler vs. Dodge*, 16 Howard, 622; *Clarke vs. City of Janesville*, Vol. 1 of this Series, 98.

An executor or administrator is not an assignee within the meaning of the prohibition. *Mayer vs. Foulkrod*, 4 Washington C. C., 349. Nor is an indorsee, as against his immediate indorser. *Evans vs. Gee*, 11 Peters, 80; *Keary vs. Farmers & Merchants' Bank of Memphis*, 16 Peters, 89; *Campbell vs. Jordan*, Hempstead, 534.

In an action by an assignee against a remote indorser he must show that the intermediate indorser could have maintained an action in the circuit court. *Fry vs. Rousseau*, 3 McLean, 106; *Mollan vs. Torrance*, 9 Wheaton, 537; *Campbell vs. Jordan*, Hempstead, 534.

In a suit by an assignee the pleadings must show that his assignor could have maintained an action in the circuit court. *Rogers vs. Lina*, 2 McLean, 126. And in an action by the indorsee against the maker the citizenship of the payee must be set forth, in order to sustain the jurisdiction. *Turner vs. Bank of North America*, 4 Dallas, 8. And, under the general issue, the burden of proof is upon the plaintiff to show that his assignor might have sustained his action in the federal court. *Bradley vs. Rhines' Administrators*, 8 Wallace, 393.—[Reporter.

¹ *Bullard vs. Bell*, 1 Mason, 243, 251; *Bank of Kentucky vs. Wister*, 2 Peters, 818.

² *Young vs. Bryan*, 5 Wheaton, 146; *Mollan vs. Torrance*, 9 do., 537.

Hough vs. First Nat. Bank of Ft. Wayne.

JOHN HOUGH, ASSIGNEE, &CO., vs. THE FIRST
NATIONAL BANK OF FORT WAYNE.

DISTRICT COURT.—DISTRICT OF INDIANA.—JUNE, 1869.

IN BANKRUPTCY.

PREFERENCE.

A few days before an adjudication of bankruptcy, the defendant, a creditor by note of \$1000, aware of the insolvency of the bankrupts, and having in the bank a general deposit of \$772, previously made by the bankrupts, received from them a check for said amount, deposited and applied the same on the note in satisfaction of \$772 thereof, and at the same time received from the bankrupts \$228 in payment of the residue of the note.

Held, that the transaction as to the check on the deposit was a mere adjustment of mutual debts, and not a fraudulent preference within the meaning of the Bankrupt Law.

Held, that the receipt of the \$228 by the bank in payment on the note was a fraudulent preference; and that the assignee was entitled to recover it back from the bank.

Porter, Harrison & Fishback, for plaintiff.

Morris & Gordon, for defendant.

MCDONALD, J.—This is an action of assumpsit. The plaintiff sues as an assignee in bankruptcy. The substance of the case made by the declaration is, that in May, 1868, a few days before the parties represented by the plaintiff were adjudged bankrupts, and being indebted to the defendant in the sum of one thousand dollars, they paid this debt to the defendant with intent to give the defendant a preference over their other creditors; and that the defendant received this payment knowing that the bankrupts were then insolvent, and in fraud

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any violation of the Bankrupt Law? We have already seen that such a set-off may lawfully be made after the adjudication of bankruptcy. And there can be no doubt that, even without the act or consent of the parties concerned, the court should, in such a case, itself decree the set-off. Consequently the transaction in question could not have been unlawful.

We may test the legality of this matter in another way. Suppose that the adjustment of these debts had not been made till after the adjudication of bankruptcy, we have seen that by the very words of the act it could then be made. And the result would be exactly the same in either case. Shall the court condemn a man for doing what the court itself does?

Again, whom does this arrangement of these mutual debts injure? The gravamen of the present action is a supposed fraud effected by the attempt to give a preference to the defendant over other creditors of the bankrupts. Now, there can be no fraud without an injury. But if this transaction had never happened, and these mutual debts had remained *in statu quo* till the debtors were adjudged bankrupts, then, as we have shown, the court would have applied this seven hundred and seventy-two dollars on the note of one thousand dollars by way of set-off precisely as the parties have done; and the assets to be distributed among the creditors would have been exactly the same as they will be if we allow the transaction under consideration to be valid. In either case, the distributive share of each creditor will be precisely the same, consequently, no creditor can be injured by the transaction, and no fraud can be perpetrated by it.

It has been urged that this transaction cannot be a set-off of mutual debts, because the note was not due at the time. By the face of the note it was due on the very day on which the check was drawn. But it was governed by the law merchant; consequently, it had three days of grace, and was not demandable till the third day thereafter. But the note was mature on the first day of grace; and the makers had the right on that day to settle or pay it. And they did settle it

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by way of part payment and part set-off on that and a subsequent day.

Moreover, since by the statute of Indiana a debt may be set-off though it matures after action brought, it is certain that in any action brought by the assignee against the bank for the deposit, the bank might have pleaded the note as a set-off; so that in no event could this deposit have become assets in the hands of the assignee, even though the adjustment of these debts had never been made by the parties.

But I do not concede that if the note had not matured, the adjustment would have been unlawful as preferring a creditor.

With this view of the case, I cannot find that the bank ought to refund the seven hundred and seventy-two dollars which it held on deposit. But as to the two hundred and twenty-eight dollars, that was a payment, and nothing else; and it plainly gave the bank a preference in violation of the law. I must therefore find that sum with interest against the bank.

Accordingly, I find the issue for the plaintiff, and assess his damages at two hundred and twenty-eight dollars and interest.

A depositor in bank may, before its bankruptcy, have his deposit credit set off against his indebtedness as indorser upon a note held by the bank and duly protested. If the parties before bankruptcy do what the law allows, and the indorser take up the note, it cannot be recovered against him. *Winslow vs Bliss*, 8 Lansing, 220.—[Reporter.

Henry vs. Henry.

JOHN SNOWDEN HENRY vs. JAMES HENRY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE,
1869.

1. **CONDITIONAL DELIVERY OF DEED.**—If a conveyance is delivered on condition that a life lease of the same estate be executed and delivered to the grantor, the grantee cannot recover in ejectment against the grantor, when the condition has not been fulfilled.

2. Subsequent negotiations, not consummated, do not affect the rights of the parties; and one party in accepting a proposition, which the other afterwards refused to carry out, does not waive his rights.

3. **SUBSTITUTED GRANTEE.**—A person substituted for the originally intended grantee, but having knowledge of the condition, does not stand in any stronger or better position.

Ejectment for eleven hundred acres of land, situate in Livingston and Will counties, Illinois. Plaintiff claims under a warranty deed from defendant. Defendant being, in May, 1858, embarrassed, and having for the purpose of improving the property in controversy theretofore borrowed largely from his brother, Alexander, of Manchester, England, applied to him (Alex.) for a loan of twenty-five thousand dollars upon the property, in order to remove the incumbrances outstanding, agreeing, subsequently, to convey the land in consideration of the further advance, he to receive a life lease at an annual rental of two thousand dollars. The deed was executed to plaintiff, a son of Alexander, but the life lease was not.

Thomas Hoyne, for plaintiff, moved to exclude the testimony relating to the conditions on which the deed was executed.

Bailey & Magruder, for defendant.

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DAVIS, J.—The life lease was sent to England with the deed, but for some reason was not executed. The question is, Was the delivery of the deed intended to be absolute or on condition? If on the condition that a life lease should be returned, manifestly the defendant is not wrongfully withholding possession, as it is conceded this has not been done; nor can he be ousted of his possession until this lease has been tendered and its covenants broken. The intention of the parties to the transaction is a question of fact for the jury. If the lease and deed were intended to be simultaneous acts, the plaintiff cannot recover. On the contrary, if the giving of the lease was a subsequent agreement, and not a part of the original transaction, or if the execution of the lease was waived, the case is different. There is no question about the legal title, but only a question of possession. That there can be a right of property separate from the right of possession, is too plain for dispute.

The motion is denied, and the plaintiff is at liberty to go to the jury on the question of fact whether the delivery of the deed was dependent on the execution of the lease.

The parties went to the jury on this issue, and Davis, J., charged as follows:

GENTLEMEN: If the jury believe, from the evidence, that James Henry proposed to Alexander Henry if he would loan him twenty-five thousand dollars to remove the incumbrances on his real estate in Livingston county that he would convey to him by absolute deed the legal right to the property on condition that Alexander Henry should execute to him, James, a lease for life at the yearly rent of two thousand dollars, and that Alexander Henry accepted the proposition, and if the jury further believe from the evidence that in transmitting the deeds and lease to Mr. Ewing, the agent, James Henry acted on the belief that Alexander Henry, on the receipt of the deed would execute the lease, and that the deed was transmitted on that conditional; and if the jury further believe that after

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the deed was received, Alexander Henry refused to execute the lease, and that James Henry has not waived his right to the lease, then the defendant has not wrongfully withheld the possession of the property from the plaintiff.

There were various subsequent propositions made, and some of them partially accepted, but the minds of the parties do not seem to have united distinctly on any, and therefore it may not be material to consider them. Of course the defendant in accepting propositions made subsequently by his brother, which the latter refused to carry out, did not waive his right to insist upon the lease, if that was a condition on which the deed was transmitted.

Under the conceded facts of the case, it would seem that the plaintiff, to whom the deed was made, instead of the brother, cannot be in any stronger or better position than if the deed had been made, as originally intended, to Alexander.

Verdict for defendant, and new trial taken under statute.

Consult *United States vs. Hammond*, ante p. 288; *United States vs. Dair*, id., 280, and cases there cited.—[Reporter.]

WILLIAM UNTHANK vs. THE TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

CIRCUIT COURT.—DISTRICT OF INDIANA.—JUNE, 1869.

1. ACCIDENT INSURANCE—WAIVER.—Where, by a policy, the defendant insured the plaintiff against bodily injuries arising by violence and accident, under this condition, that in case of such injury to the insured during the life of such policy, he should give the insurance company forthwith, by letter addressed to the company at Hartford, a notice stating the nature and extent of the accident and injury; and where, on the happening of the same, he omitted to give such notice,—

Held, that, where, on receiving proof of the injury by violence and accident, the company examined the proofs, and refused to pay the policy on other grounds than the omission to give such notice, the condition of the policy requiring such notice was thereby waived; and that, the other necessary facts being proved, the insured was entitled to recover on the policy.

2. EVIDENCE.—A letter offering to compromise, but containing a waiver, may be read in evidence, not to prove the offer, but to establish the waiver.

Martindale & Tarkington, for plaintiff.

Collin, Bills & Howland, for defendant.

MCDONALD, J.—This is an action of assumpsit on a policy of insurance. The defendant has pleaded the general issue; and pursuant to the act of Congress on the subject, the parties waive a jury, and submit the trial of the issue to the court.¹ The policy, among other things, provides that, if the insured should sustain bodily injuries by violent and accidental means, which should immediately and totally disable and prevent him from the prosecution of any and every kind of business, then, on satisfactory proof of such injuries, he should be indemnified against loss of time in a sum not ex-

¹ 18 U. S. Statutes at Large, 501.

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ceeding twenty-five dollars per week for such period of continuous, total disability as shall immediately follow the accidents and injuries aforesaid—not exceeding twenty-six weeks from the time of the accident.

On this provision of the policy the present action is brought. And the declaration charges that, during the existence of the policy, the insured was engaged in the business of a horse-trader; and, having occasion to take a drove of horses to market, on his journey for that purpose, the horses taking fright, he was violently thrown from the horse he was riding, and thereby sustained such bodily injuries as immediately and totally disabled and prevented him from the prosecution of any kind of business for twenty-six weeks.

The evidence abundantly sustains these allegations in the declaration.

But the defendant insists that, on the evidence adduced, the plaintiff cannot recover, because he has failed to prove the notice required by the policy; and this is really the only point of any difficulty in the case.

One of the conditions contained in the policy is, that, in the event of injuries for which claim may be made under the policy, the insured should immediately thereafter give notice in writing, addressed to the Travelers' Insurance Company, Hartford, Connecticut, stating the full name, occupation, and address of the insured, with full particulars of the accident and injury. And it does not appear by the evidence that such a notice was given. There is indeed proof that, as soon as the plaintiff became aware of the nature of the injury, which was *hernia*, he applied to the defendant's examining physician, who ascertained the nature and extent of the injury, and who, at the request of the plaintiff, in writing notified the local agent of the defendant, then residing in the plaintiff's neighborhood, of the time, nature, and extent of the injury. And it is also proved that immediately after the discovery of the nature and extent of the injury, the plaintiff did, at the request of said local agent, forward to a branch office or agency

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of the insurance company at Chicago, the specifications and proofs of the injury in due form as required by the policy. And there is much plausibility, if not good reason, for the conclusion that this was a substantial performance of the condition touching the notice contained in the policy.

But the plaintiff's counsel seem disposed to rest this question concerning notice on another ground. They insist that there has been a waiver by the defendant of the necessity of the notice in question. This alleged waiver stands on a letter addressed to the plaintiff by the local agents of the insurance company. This letter was written after the aforesaid specifications and proofs had been forwarded to, and examined by, the defendant's branch office or agency at Chicago. The letter is as follows:

"RICHMOND, IND., April 5, 1869.

William Unthank, Spiesland, Ind.—*Dear Sir:*—We have just received the decision of the Travelers' Accident Company on your case. It is as follows: They agree to pay you for four weeks' compensation, which would be for a length of time in which they claim the rupture would be cured as well as it ever would be. They offer this amount as a *compromise*; for the company does not admit that you have established the fact that the rupture was caused by the accident referred to in your proofs sent them. Shall we send and get the money—\$100—for you? Let us hear at once. Truly,

COCCHALL & DOAN."

The defendant has objected to this letter as evidence, on the ground, as is argued, that it is a mere offer to compromise, which was not accepted. It is certainly true that a mere offer to compromise, not accepted, is inadmissible as evidence. But if an offer to compromise is connected with other matters important as evidence in the same letter, the whole letter may be read in evidence. Thus an offer to compromise accompanied by an admission of an item of indebtedness, is admissible in evidence to prove that item.¹ And so, no doubt, if the offer to compromise is accompanied by a waiver, it may

¹ 1 Greenleaf on Evidence, §192.

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be given in evidence, not to prove the offer, but to prove the waiver. To establish the latter, I think the letter in question is admissible in evidence.

But is this letter sufficient evidence that the defendant has waived the right to insist on the notice as a condition precedent? In this letter, the objection to the payment of the whole claim, as well as the denial of liability to pay any part of it, was not made on the ground that the proper notice had not been given, but solely on the ground that the total inability on the part of the plaintiff to perform any kind of business continued only four weeks after the accident, and that the proofs furnished by the plaintiff to the defendant did not establish the fact that the injury of which the plaintiff complained was the result of the accident to which he attributed it. We may perhaps well ask, if the defendant was disposed to resist the payment on the ground that the formal notice had not been given, why was not this objection noticed in the letter? And why did the company make the "decision" mentioned in the letter on other grounds than the want of notice, as it seems was done? And may we not here well apply the maxim that *expressio unius est exclusio alterius*?

In Bodle vs. The Chenango County Mutual Insurance Co., 2 Comstock, 53, where, by the terms of a policy of insurance, the insured was required within thirty days after a loss to transmit to the secretary of the company a particular account of such loss, and where a defective account of the loss was transmitted, and the company at the time made no objections on that ground, the objection, being raised afterwards, was held to be waived.

It has been held in Connecticut that where an agent of an insurance company was acting for it in the case of a loss, he might by a waiver bind his company as to the omission to furnish preliminary statements of the loss.¹

¹ Rathbone vs. City Fire Insurance Co., 81 Connecticut, 198.

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In *Brown vs. Kings County Fire Insurance Co.*,¹ it was held that where papers containing preliminary proofs of loss by fire are served on, and received by, the insurance company, without objection made at the time, it is too late at the trial for the company to object that these preliminary proofs were defective; especially so when the company had before suit refused payment on the ground alone that the risk had been increased after the policy was executed. To the same effect are the following cases: *Sexton vs. Montgomery County Insurance Co.*, 9 Barbour, N. Y., 191; *Clark vs. New England Mutual Fire Insurance Co.*, 6 Cushing, 342; *Francis vs. Ocean Insurance Co.*, 6 Cowen, 104; *Columbia Insurance Co. vs. Lawrence*, 10 Peters, 507; *Taylor vs. Merchants' Fire Insurance Co.*, 9 Howard, 390.

It appears to me that Chancellor Walworth has put the doctrine of waiver, applicable to cases like the one under consideration, on the true basis. He says that "good faith on the part of the underwriters, requires that, if they mean to insist upon a mere formal defect of this kind in the preliminary proofs, they should apprise the assured that they consider the same defect in that particular, or to put their refusal to pay on that ground as well as others, so as to give him the opportunity to supply the defect before it is too late; and if they neglect to do so, their silence should be held a waiver of such defect in the preliminary proofs, so that the same shall be considered as having been duly made according to the conditions of the policy."² This is the honest doctrine; and its principle is fully applicable to the case at bar. And in view of all these authorities, as well as with a proper view to what is just, and right, and fair, I do not hesitate to hold that the defendant has waived all objection for the omission to give the notice required in the policy.

¹ 81 Howard's Practice R., 506.

² *Ætna Fire Insurance Co. vs. Tyler*, 16 Wendell, 335.

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Accordingly, I find the issue for the plaintiff, and assess his damages at six hundred and seventy-three dollars.

In a recent case in this Northern District of Illinois, *Thomas Cahill vs. Andes Insurance Company*, 1878, to appear in subsequent volume of this Series, BLODGETT, J., held that where an insurance company claimed cancellation of a policy, on the ground of the non-payment of the premium, and placed their refusal to pay the loss on that ground, they are estopped from afterwards, when sued on the policy, setting up a different ground of defense.

This rule was also laid down in *Harding vs. Parshall*, 59 Illinois, 219.—*[Reporter.*

STEWART vs. THE WESTERN UNION RAILROAD
COMPANY.

CIRCUIT COURT.—DISTRICT OF INDIANA.—JUNE, 1869.

1. LIABILITY FOR EXPLOSION.—If a steamer, while being run under a lease, is lost by explosion, it is a question of fact for the jury whether the lessee used all reasonable skill, and whether the explosion was one which human skill could have prevented.

2. DEFECTS—ACCEPTANCE, WHEN WAIVER.—When the lease provided that the steamer was in good condition when delivered, and the lessee accepted her without objection, he is estopped from setting up as a defense any defects which were known, or might have been seen, by him or his servants.

3. HIDDEN DEFECT.—If the explosion was the result of some hidden, unknown defect then the lessee is discharged.

4. INTEREST.—The jury may allow interest by way of damages since the explosion.

Action to recover for damages by the explosion of the steamboat Lansing, while being used by the defendant under contract with the plaintiff, the owner.

Stewart vs. Western Union R. R. Co.

*Samuel W. Fuller, for plaintiff.**W. K. McAllister, for defendant.*

DAVIS, J.—In the spring of 1867, the defendant leased of the plaintiff a steamboat called the Lansing with a view of transporting freight and passengers from Davenport, Iowa, to Port Byron, Illinois. By the terms of the contract the railroad were to return the steamboat to the plaintiff at the end of a certain time in good condition, paying reasonable compensation for the use of the same. While the steamboat was making passage from Davenport to Port Byron and had landed at Hampden, on the Iowa side, an explosion took place, and this action was brought to recover compensation for the damages sustained in consequence of the explosion, and the inability thereby of the railroad company to return the boat, on the ground that the explosion was the result of the negligence and want of due care and skill of the employees of the company.

The contract provided that the boat was in good condition and that two persons named in the contract might or should determine whether the boat was or was not in good condition. It turned out, in point of fact, that these persons from some cause never did determine whether the boat was in the condition named in the contract, but the boat was delivered to, and received by, the defendant without objection. If there was any defect which was known to, or could be seen by, the servants of the defendant, and without making objections in consequence of the defect, then the defendant is estopped from setting it up as a defense to this action. The time to make that objection was when the boat was delivered and that might have been urged as a reason for non-acceptance.

It was the duty of the defendant to return the boat according to the terms of the contract, unless prevented from so doing by a misfortune that skill, care and diligence could not prevent. In the use of the boat the defendant was bound to

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exercise all reasonable skill, and I leave it as a question for the jury to determine whether the explosion was one which human skill could have prevented. If it was the result of some hidden, unknown defect, the defendant is discharged. The contract provides that for extraordinary repairs the plaintiff, the lessor, should be chargeable.

The question arises as to the right to recover interest. Although as a matter of law you are not obliged to give interest, yet if you find for the plaintiff, and fix upon the value of the boat at the particular time as the compensation due the plaintiff, you may, by way of additional damages, give interest. It is optional with you.

Negligence and diligence are questions of fact for the jury to pass upon. *Skelley vs. Kahn*, 17 Illinois, 170; *Galena and Chicago Union R. R. Co. vs. Farwood*, Id., 509; *Illinois Central R. R. Co., vs. Nunn*, 51 Id., 78; *Ohio and Mississippi R. R. Co., vs. Shanefelt*, 47 Id., 497; Story on Bailments, §§11, 174, note 1; *Doorman vs. Jenkins*, 2 Adolphus & Ellis, 256; *Vaughan vs. Menlone*, 8 Bingham's New Cases, 468, 475; *Beardslee vs. Richardson*, 11 Wendell, 25.

The hirer is to restore the thing in as good condition as he received it, unless it has been injured by some internal decay, or by accident, or by some other means wholly without his default. Story on Bailments, §414: *Millow vs. Salisbury*, 18 Johnson, 211. And parol evidence is admissible to contradict or explain a written instrument in some of its recitals of facts, where such recitals do not, on other principles, estop the party to deny them. 1 Greenleaf on Evidence, §285; *Harris vs. Rickett*, 4 Hurlstone & Norman, 1; *Chapman vs. Callis*, 2 Foster & Finlayson.—[Reporter.

Putnam *vs.* New Albany.

JOHN P. PUTNAM *et al.* vs. THE CITY OF NEW
ALBANY *et al.*

CIRCUIT COURT.—DISTRICT OF INDIANA.—JULY, 1869.

IN EQUITY.

1. JURISDICTION—WHEN EXCLUSIVE.—It is a general rule that when different courts have concurrent jurisdiction of a matter, the first that takes the jurisdiction excludes the others. But to this rule there are exceptions.

2. JURISDICTION TO ENFORCE JUDGMENT OF STATE COURT.—When a party has obtained a judgment in a state court against a corporation, on account of whose insolvency he is unable to collect the same, he may file his bill in equity in a national court to oblige the debtors of the corporation to pay the judgment, if the citizenship of the parties to the bill will confer the jurisdiction according to the provisions of the Judiciary Act.

3. CODE—CUMULATIVE REMEDIES.—The Indiana code of procedure, which gives certain equitable remedies in courts of law, is, as to these, cumulative only; and it does not take from courts of equity those remedies which existed before the code was adopted.

4. STALE DEMAND.—Courts of equity are reluctant to sustain a demurrer to a bill on the ground of staleness alone, unless it is such that the delay would bar an action at law on the same claim, or unless there is a strong analogy between the case in equity, and a case at law on which a statute of limitation would operate.

5. EXHIBITS.—There is no rule in equity pleading requiring that either writings mentioned in a bill, or copies of them, shall be filed, as exhibits, with the bill.

6. CROSS-BILL.—In a suit in equity in this court, in which all the defendants are citizens of Indiana, one defendant cannot file a cross-bill against his co-defendants proposing to litigate subjects foreign to the matters set up in the original bill, and in which the original complainants have no interest.

7. RATIFICATION OF SUBSCRIPTION BY CITY.—An illegal subscription of railroad stock by a city may be ratified under a subsequent act of the legislature authorizing its ratification. A bill alleging such subscription ought to aver the ratification. But the answer, by putting in issue the question of such ratification, may supply the want of such averment in the bill.

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8. PRACTICE.—The Indiana code authorizes a plaintiff, in a proceeding to foreclose a mortgage, to take a personal judgment for the debt secured by it, if such debt be evidenced by a note or other writing than the mortgage.

9. SUBSCRIPTION—WHEN CANNOT BE RESCINDED.—A subscription of capital stock in a corporation cannot be rescinded so as to affect the rights of its creditors while the corporation is insolvent.

10. WHEN MAY BE MODIFIED.—But when the subscription is conditional, and while the corporation is solvent, it may be reduced and modified according to the terms of the condition; and such modification, acquiesced in at the time by all parties, will not, after the lapse of fifteen years, be set aside.

11. ESTOPPEL.—To render a former adjudication an estoppel, the point adjudicated must have been admitted, or distinctly put in issue in the course of the former adjudication.

12. PAROL EVIDENCE, in aid of the record to establish an estoppel, cannot be tolerated.

13. VOLUNTEER.—An answer and cross-bill filed by a person not named in the bill, nor admitted as a defendant, will be stricken from the files.

Stevenson, Burke, and Porter, Harrison & Hines, for complainants.

George W. Howk and Hendricks, Hord & Hendricks, for defendants.

MCDONALD, J.—This is a bill in chancery filed January 29, 1868, by John P. Putnam, a citizen of Massachusetts, and Herman Ely and Stevenson Burke, citizens of Ohio, against the New Albany and Sandusky City Junction Railroad Company and the City of New Albany, — both Indiana corporations,—and Thomas L. Smith and thirty-three others, citizens of Indiana, and subscribers to the stock of said company.

On the 26th of June, 1868, the defendants, the city of New Albany, Thomas L. Smith, John S. McDonald, Benjamin F. Scribner, Horatio N. Duval, Thomas Danforth, William S. Culbertson, John B. Crawford, Ephraim S. Whistler, Bela C. Kent, Alexander J. Kent, Michael C. Kerr, Isaac P. Smith, John H. McMahon, Lawrence Bradley, James Montgomery, Samuel Montgomery, George V. Howk, Bradford E. Scribner, John F. Anderson, John B. Winstandley, Jesse J. Brown, and Augustus Bradley filed a demurrer to the bill.

Ezekiel R. Day, one of the defendants, has filed his answer to the bill, and a cross-bill against his co-defendants.

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Henry Beharrel, a mere volunteer, has entered an appearance, and filed his answer and a cross-bill.

The defendants, who have demurred to the original bill, also demur to these cross-bills.

The case is now before the court on these demurrers.

As to the answer and cross-bill of Beharrel, we may as well say at once, that, as he is not named in the original bill, and has not been admitted a defendant by the court, he is an intruder, and his answer and cross-bill are ordered to be taken off the files. We have no concern with him in this suit, and advise him not to intermeddle in other people's business.

I. We will first consider the demurrer to the original bill.

This bill charges that, on the 14th of November, 1857, in the Floyd Circuit Court, Indiana, one William F. Pierson and Harvey Seymour recovered a judgment against said railroad company for fifty-four thousand eight hundred and fifty-five dollars, as trustees for the present complainants and those whose interests they represent, in certain proportions stated in the bill; that about the 30th of March, 1858, thirteen thousand three hundred and sixty-eight dollars and eighty-three cents was paid on that judgment, leaving then due thereon in principal, interest and costs, forty-two thousand seven hundred and twenty dollars and forty-one cents, no part of which has ever been paid; that afterwards execution was duly issued on said judgment and returned *nulla bona*; and that said company then was, ever since has been, and now is, wholly destitute of property subject to execution, and long since abandoned its enterprize, and ceased to maintain an official organization.

The bill further alleges that the city of New Albany, for subscriptions made November 19, 1853, to the capital stock of said railroad company, is indebted to that corporation in the sum of three hundred and ninety-three thousand dollars, with interest thereon payable semi-annually, at six per cent., from and after the first of January, 1856—the principal being payable January 1st, 1874; that no part of said principal or

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interest has been paid; that more than seventy thousand dollars of said interest is now due; and that "by some pretended compromise made between said city and said railroad company, after said railroad company became insolvent, said city obtained possession" of the bonds which had been issued on said subscription, and procured an attempted cancellation of said subscription,—all which doings were and are illegal, null, and void.

The bill also avers that the other defendants to the bill severally subscribed large sums of money to the capital stock of said company in the year 1855, the amount of each of which subscriptions is stated in the bill. And it is averred that all these draw interest from the first of January, 1855; and that no part of the principal or interest has been paid.

The bill prays that the amount of money due by each of the defendants to the railroad company be ascertained; that enough of the money so found due to pay off the said judgment be ordered to be applied to the payment thereof; and that such other relief as justice and equity require be decreed.

In support of the demurrer, the following objections are urged to the bill:

1. It is argued that, upon the face of the bill this court has no jurisdiction of the cause.

The bill sufficiently states that the complainants and defendants are citizens of different states; so that, under the provisions of the Constitution and the Judiciary Act, there can be no doubt of our jurisdiction over the persons of the parties.

But it is urged that we have no jurisdiction of the subject matter of this suit. This objection stands on the fact that the judgment mentioned in the bill, and sought to be enforced in this proceeding, was rendered by a state court; and that suitors having elected to pursue their remedy in a state court of competent jurisdiction, and having obtained a judgment there, cannot then abandon that forum, and seek the satisfaction of that judgment in a national court. It is un-

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doubtedly a general rule that when the courts have concurrent jurisdiction of the same subject matter, the first that takes the jurisdiction excludes the other.¹ But this rule is subject to many exceptions. Indeed, it seems to apply only in cases where the parties are the same or stand in privity to each other, and where the points in litigation and the redress sought in both courts are identical. Thus, in the case of *Buck vs. Colbath*, 3 Wallace, 334, it is held that the rule in question is subject to some limitations, and is confined to suits between the same parties or privies seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought, and does not extend to all matters which may by possibility become involved in it. And Mr. Justice Miller, in delivering the opinion in that case, said "in examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. For example, a party having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law, in an action of ejectment, to get possession of the land. Here in all the suits, the question at issue may be the existence of the debt mentioned in the notes and mortgage; but as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither court is affected by the proceeding in the other. And this is true notwithstanding the common object of all the suits may be the collection of the debt." This reasoning appears to be sound; and it is applicable to the case at bar. Its test is to "regard the nature of the remedies, the character of relief

¹ *Shelby vs. Bacon*, 10 Howard, 56; *Taylor vs. Carryl*, 20 do., 583; *Freeman vs. Howe*, 24 do., 450.

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sought, and the identity of the parties in the different suits." Here the nature of the remedies is different. The remedy sought in the state court was an action at law, followed by a *fiery facias*; but the remedy in this court is by a bill in chancery to force the company's debtors to pay this judgment. In that case, the character of relief sought was to oblige the company to pay the debt; in this case, the character of relief sought is to make the debt from others than the company. And in that action, the parties were not the same as in this. It is true, indeed, that in the suit in the state court, the present complainants appear to have been represented by their trustees, and were therefore privies to that proceeding; but the defendants in the two suits are in no sense the same. None of the parties who demur to this bill were parties to the action in the Floyd Circuit Court. As to them, that proceeding was *res inter alios acta*. Moreover, this bill does not propose to litigate, or in any manner affect, any point that was litigated in that action.

It is argued, however, that the present suit is merely ancillary to the case in the state court; and that, merely being in aid of it, it should be carried on in that forum. But, though the premises may be true, the conclusion is a *non sequitur*. The case of *Hatch vs. Dorr*, cited from 4 McLean, 112, does not support this conclusion. It merely holds that a creditor's bill, seeking to obtain the fruits of a judgment at law is so far a continuation of the suit at law originally pending in the same court, as to render the citizenship of the parties to the bill unimportant to the jurisdiction of the court.

But, so far as this court is concerned, this question must be deemed *res judicata*. In *Shields vs. Thomas*, 18 Howard, 253, it is settled that a bill in aid of a prior decree of another court may be sustained in a United States circuit court. So, in the case of *Barber vs. Barber*, 21 Howard, 582, it was held that the District Court of the United States for the District of Wisconsin had jurisdiction to entertain a bill to enforce a decree for alimony rendered in a state court of New York. It

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has been argued, indeed, that these cases in Howard are not in point, because the judgments attempted to be enforced were not rendered in the same states respectively in which the bills to enforce them were brought. It is impossible to perceive how any importance can arise from this circumstance. Surely if this court can entertain a bill in aid of a judgment rendered in a state court of New York, it could do the same thing if the judgment had been rendered in Indiana. But a case in this respect exactly like the one at bar has passed the ordeal of the Supreme Court of the United States. We allude to the case of *Ogilvie vs. The Knox Insurance Company*.¹ That was a creditor's bill filed in this court in aid of judgments at law rendered in the Circuit Court of Knox County, Indiana. It sought to make the debtors of the insurance company liable to the payment of those judgments. In every respect, the case was almost identical with the one under consideration. The case was twice in the Supreme Court;¹ and twice that court held the bill good. It is true that there is nothing in the case as reported indicating that any question of jurisdiction was raised before that court. But it would be presuming too much to suppose that the court twice decided that bill to be good, if on its very face it appeared that the court in which it originated had no jurisdiction of it. Certainly, if we had jurisdiction in that case, we have in this.

This objection to the jurisdiction is also urged on the ground that the complainants have a full and ample remedy at law. In Indiana, the Code of Civil Procedure provides a remedy called "Proceedings Supplementary to Execution."² This provision of the Indiana code has been adopted as a rule of this court; and it gives a remedy as full and ample as the proceeding by creditor's bill can give. Whether, in urging this objection, counsel mean to say that the complainants

¹ 23 Howard, 380; 2 Black, 539.

² 2 Gavin & Hord, 260.

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have a plain and adequate remedy at law in the state court that rendered the judgment, or in the United States court in which the judgment is sought to be enforced, or in both these courts, is not very apparent. But, in the view I take of the question, this uncertainty can make no difference. For I think that whatever be the force of the statutory remedy in aid of execution, it is only cumulative; and that it cannot take away the old remedy by creditor's bill.

2. The next objection urged in support of the demurrer, is that, on the face of the bill, the claim is so stale, that a court of equity ought not now to take jurisdiction of the cause.

Courts of equity are very reluctant to sustain a demurrer to a bill on the ground of staleness alone, unless it is such that the delay would bar a suit at law on the same claim, or unless there is a clear and strong analogy between the case in chancery and a case at law on which a statute of limitation would operate.

By all the Indiana statutes of limitation, the period of time fixed does not begin to run till the day on which "the cause of action accrued." On written contracts and judgments, these statutes fix the period of limitation at twenty years; on contracts not in writing, the period is six years. To which of these periods does the case at bar apply? Does the cause of action set up in the bill stand on a contract not in writing, or on written contracts or records? I think this question is easily answered. The judgment for fifty-four thousand eight hundred and fifty-five dollars—the various subscriptions for stock—the executions of divers coupon bonds—the failure to effect satisfaction of the judgment by execution on it—all of these stand on written contracts and records. These plainly constitute the cause of action set up in the bill. It will not do to say that the fraudulent cancellation of the city's bonds, as charged in the bill, forms a part of the cause of action. For the bill would be good without that charge; it was probably only inserted in anticipation of matter of defense in the answer.

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I think, therefore, that the present case falls within the limitation of twenty years, and not within any other limitation fixed by the Legislature of Indiana; and that, as all these matters arose much less than twenty years ago, the objection on the ground of staleness cannot prevail.

3. It is urged that the bill is defective for not making exhibits of copies of the judgment, bonds, and subscriptions mentioned in it.

I think there is nothing in this objection. I find no authority to support it. On the contrary, the case of *Cecil vs. Dynes*¹ is expressly against it. In view of the twenty-sixth Rule in Chancery promulgated by the Supreme Court, I should think that no exhibit need be filed with any bill.

II. Our next inquiry is as to the demurrer to the cross-bill filed by Ezekiel R. Day.

This cross-bill is filed against Day's co-defendants to the original bill. The complainants to the original bill are not made parties to it. It merely proposes a litigation between the defendants to the original bill, all of whom are citizens of Indiana—a litigation in which the original complainants have no interest.

The cross-bill charges that Day, besides subscribing five thousand dollars to the stock of the railroad company, as charged in the original bill, also subscribed in addition thereto thirty-one thousand one hundred dollars, making all his stock thus subscribed thirty-six thousand one hundred dollars; that on this stock he has paid thirty-two thousand six hundred dollars—leaving yet due only three thousand five hundred dollars; that many of the subscribers, like himself, had fully or nearly paid up, but the defendants to the cross-bill had paid nothing; that these defendants ought therefore to pay the debt claimed in the original bill; and that an accounting ought to be had among all the subscribers, to ascertain

¹ 2 Indiana, 266.

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how much each has paid and how much he owes on his subscription. The cross-bill prays for such accounting, for a receiver, and for a decree reimbursing Mr. Day and other subscribers for their proportionate over-payments. In fine, it seems to propose that this court shall take jurisdiction of all the affairs of the railroad company, decree on all the rights and liabilities of all the subscribers, and wind up that company as an insolvent corporation.

It is not necessary to spend time on this cross-bill. The mere statement of its contents plainly indicates that this court cannot take jurisdiction of it. The parties to it are all citizens of Indiana. It attempts to draw into the original case a vast amount of litigation in which the complainants to the original bill are not concerned. The matter of the cross-bill is a matter over which the state courts have full jurisdiction; and the pendency of the original bill here can in no way affect that jurisdiction. Besides, it appears to me that it would be unjust to postpone the final hearing and decree on the original bill till the matters set forth in the cross-bill should be decided.

The demurrer to the original bill is overruled at the costs of the parties demurring.

The demurrer to Day's cross-bill is sustained, and the same is dismissed at his cost.

Afterwards, on the first day of June, 1869, this cause came on for hearing and final judgment and decree on the bill, answers, exhibits, and depositions, when the following opinion and decree were rendered:

MCDONALD, J.—The object of this bill is to obtain a decree that the defendants pay the complainants so much of their indebtedness by way of subscriptions to the capital stock of the New Albany & Sandusky City Junction Railroad Company, as will satisfy the complainants' judgment for fifty-four thousand eight hundred and fifty-five dollars, with the interest thereon and the costs, obtained against that Company.

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The city of New Albany has filed a separate answer; and all the other defendants have answered or been defaulted.

As there is very little dispute touching the facts of this case, it is unnecessary to state here the particulars of the facts set out in the answers. The points principally in dispute are several important legal questions. And the facts disclosed in the answers it will be most convenient to state when we come to examine those questions as they are developed in the answers and the evidence.

We shall therefore proceed at once to consider those questions.

1. It is urged on the part of the city of New Albany that, so far as appears in this case, she is not, and never was, legally indebted to the railroad company on her subscription mentioned in the bill. There certainly can be no decree against that city unless it affirmatively appears that she is indebted to the railroad company. The bill says that said city "is indebted to said railroad company in the sum of three hundred and ninety-three thousand dollars, with interest," &c., * * and that "said indebtedness arose as follows: That on the 19th day of November, 1853, the said city, by its mayor, duly subscribed to the capital stock of said railroad company the sum of four hundred thousand dollars, to be paid," &c.

But it is admitted that, at the time when said subscription was made, the city had no legal authority to make it. This has, indeed, been decided by the Supreme Court of Indiana, in the case of *The city of Lafayette vs. Cox*.¹

But in answer to this objection to the validity of the subscription, the complainants rely on an act of the Indiana Legislature, passed February 21, 1855, authorizing cities to ratify subscriptions to the stock of railroad companies previously made. That act declares that city authorities which

¹ 5 Indiana, 88.

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had previously subscribed stock to railroad companies, should thenceforth have power to ratify the same.

The bill says nothing of any ratification of the subscription under said act. But it alleges "that said city, in part payment of its said subscription of four hundred thousand dollars, executed, issued, and delivered to said company two hundred bonds of one thousand dollars each; that said bonds had interest warrants or coupons attached to each for the interest at six per cent. * * * and that said bonds were delivered to said railroad company between the 25th day of March and the 9th day of June, 1854," and were payable to bearer. And whether this allegation is equivalent to an averment of a ratification under said act, is a question discussed in argument. I think this question must be decided in the negative. If the complainants occupied the position of innocent purchasers of the bonds issued by the city, that circumstance ought, perhaps, to estop the city from insisting that the bonds were illegally issued. But here the foundation of the complainants' action is a judgment against the railroad company rendered, not on bonds of the city, but on bonds issued by that company, and which, so far as appears, had no connection with the city bonds. The complainants claim to have their judgment satisfied out a debt due by the city to the railroad company; and if the debt so due is not a legal debt, they cannot recover. That, at the time when the subscription was made, the city had no power to create a legal debt thereby, is settled by said decision in 5 Indiana, 38. And it is equally certain that by virtue of the act above cited the city might have legalized and ratified said subscription. But there is nothing in the bill showing that such a ratification was ever executed. It therefore does not appear by the bill that the city is legally indebted to the railroad company. If my attention had been called to this defect in the bill when I decided the demurrer to it, I would have sustained the demurrer to it. But it was not. It now, however, becomes a question whether the answer of the city has not cured this defect. It says:

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“ This respondent is advised that it is pretended and claimed by said complainants and others that said unauthorized and void subscription of stock to said railroad company was, after said pretended making thereof, ratified by said common council pursuant to power conferred by a subsequent act of the general assembly, entitled, ‘ An act to enable cities which have subscribed for stock in companies incorporated to construct works of public utility under the 56th section of the general act for the incorporation of cities to ratify the same, approved February 21, 1855.’ But respondent says that said unauthorized contract and subscription of stock has never been ratified by said common council or by said city, pursuant to the authority conferred by said last act, or otherwise; and that the same remains and is void.” To this answer the complainants have filed a general replication in the usual form, which distinctly makes an issue on the matters above cited from the answer of the city. Issue is fairly taken upon them. These allegations in the answer, as denied in the replication, supply the defect in the bill. There is abundant evidence to prove the subsequent ratification, and it must therefore follow that the objection to the legality of the subscription by the city cannot be sustained.

2. The defendants object that the judgment set out in the bill is a judgment *in rem* only, and not a judgment *in personam*; and that therefore this action must fail.

The record of the judgment in question discloses a proceeding to foreclose a mortgage according to the forms and practice of the Indiana code. The complaint in the case had the common prayer for foreclosure, “ and for all other proper relief.” The statute under which said foreclosure proceedings were had provides that, when there is a written agreement to pay the debt secured by the mortgage, as there was in the case in question, the court should “ direct in the order of sale that the balance due on the mortgage and costs, which may remain unsatisfied after the sale of the mortgaged premises, shall be levied on any property of the mortgage debtor;

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and that a copy of the order of sale and judgment shall be issued and certified by the clerk under the seal of the court to the sheriff, who shall thereupon proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest, and costs, as upon execution; and if part of the judgment, interest, and costs remain unsatisfied, the sheriff shall forthwith proceed to levy on the residue of the other property of the defendant.”¹

The statute cited undoubtedly contemplated a personal judgment in proceedings to foreclose a mortgage. Under it, the practice has always been to take personal judgments for the whole debt secured by the mortgage, in such proceedings. The judgment in question is on its face a personal judgment. It is that the complainants “recover of said railroad company the sum of,” &c., “and that said mortgage be foreclosed,” &c.

There is nothing in this objection.

3. On the part of the city of New Albany, it is urged that though the said subscription is valid, and though said judgment is a personal judgment, yet the city has made a perfect accord and satisfaction for the said subscription and for the bonds issued thereon to the railroad company, and is therefore not liable in this action. If these premises are true, the conclusion is inevitable.

By the city’s answer and the evidence, the following facts are established:

In the year 1837, the railroad company owed the Ohio Insurance Company thirty-six thousand dollars for borrowed money. In August of that year, the railroad company truly represented to the city council that the railroad could not be built, and that the company was utterly insolvent; and it thereupon proposed that if the city would pay the said debt of thirty-six thousand dollars to the Ohio Insurance Company, the railroad company would release and give up to the city

¹2 Gavin & Hord, 294, 295.

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her subscription of four hundred thousand dollars, and the bonds that had been issued on that subscription. The city accepted this offer, and paid said thirty-six thousand dollars; and the railroad company cancelled the subscription and delivered all the bonds she had issued on it but seven. At first blush this looks like a good accord and satisfaction of the debt in question. And it certainly would be good if it did not affect the rights of the creditors of the railroad company.

The question arising on this state of facts is, Is said compromise valid as against the creditors of the company?

It is certain, as a general rule, that parties capable of contracting may at their pleasure rescind their contracts and may settle their mutual obligations by mutual accord and satisfaction. To this rule, however, there are exceptions; and the complainants insist that the present case is an exception to it.

That at the time of this supposed compromise the railroad company was utterly insolvent, and that the common council of the city of New Albany had at that time notice of that insolvency, are facts explicitly stated and admitted in the answer of the city.

Under these circumstances, had the city power to annul her subscription by the accord and satisfaction mentioned in her answer? If the creditors of the company had a lien on the stock subscribed for the payment of their debts, it would seem that the subscription in question could not be annulled without the consent of those creditors. For the most prominent exception to the above-named rule touching the right of parties to a contract to rescind it, is that when the interests of third persons have become involved in a contract it cannot be rescinded without their consent. In the case of *Wood vs. Dummer*,¹ Mr. Justice Story held that the capital stock of a corporation is, on general principals, to be deemed a pledge, or trust fund, for the debts contracted by the corporation; and

¹ 8 Mason, 808.

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that since corporators are not personally liable for the debts of their corporation, the capital stock assumes the liability, and to this fund credit is universally given by the public as the only means of repayment. And he held that, as the capital stock is a "trust fund," it might be followed into the hands of any person having notice of the trust attached to it. In *Slee vs. Bloom*,¹ where an insolvent corporation undertook to discharge its stockholders on the payment of thirty per cent. of their subscriptions, it was held that such a discharge was void as against creditors. And Mr. Justice Spencer characterizes it as "an attempt to get rid of a responsibility which the law and common justice imposed." In *Mann vs. Cooke*,² a compromise of a subscription of stock very much like the present was held to be a fraud both on other stockholders of the corporation and on its creditors. These authorities, and many others to the same effect, establish the rule that the unpaid capital stock subscribed to a corporation cannot, by any agreement between the subscriber and the body politic, annul it so as to affect the rights of creditors. Indeed, a decision authoritative in this court—*Bell vs. The Mobile & Ohio Railroad Company*³—goes even farther than this, and holds that "it is very clear that a municipal corporation * * * could not modify or alter the subscription voted by the people" of stock to a railroad company, unless authorized to do so by the legislature.

I conclude, therefore, that this subscription of stock which had been voted by the citizens of New Albany, and subscribed in pursuance of that vote, thereby became a trust fund in favor of the creditors of the railroad company, and that they had such an interest in it, that, without their consent, the subscription could not be annulled.

¹ 19 Johnson, 456.

² 20 Connecticut, 178.

³ 4 Wallace, 598.

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4. The defendants set up in their answers, as a bar to this action, a former adjudication of the complainants' cause of action.

The answer states that, in February, 1863, one William Lindley filed in the Floyd Circuit Court, Indiana, a complaint against the present complainants and others, alleging that he—Lindley—was the owner of three of the bonds mentioned in the trust deed which, as already stated, the railroad company executed to Pierson and Seymour, and praying a foreclosure and sale of the mortgaged premises mentioned in the trust deed. The answers further state that the defendants to that action, in May, 1864, filed answers and cross-complaints thereto; and that such proceedings were thereupon had, that the Floyd Circuit Court finally adjudged and decreed, that the present complainants and the persons under whom they hold had received full payment and satisfaction of the claims on which the present action is brought.

In proof of this defense of a former adjudication of the complainants' demand, a transcript from the Floyd Circuit Court is produced. By this transcript it appears that in February, 1863, a suit was brought in said court as alleged in the answers above referred to. The suit was brought by Lindley "for himself and for all others holding bonds similar to the three held by him." The complaint says nothing about the payment or satisfaction of the claims sued on in the present suit. By the transcript it appears that said suit by Lindley continued on the docket till February, 1868, during which period answers, replications, cross-complaints, demurrers, and exhibits "voluminous and vast" were filed and discussed. The transcript shows that, on the day last aforesaid, the complainants in the present suit, Putnam, Ely, and Burke, appeared in said suit of Lindley, and, "joining in the plaintiff's complaint therein, filed separate answers averring therein that they are severally the owners and holders of certain of the bonds described in the mortgage mentioned in said complaint, and severally demand judgment for

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the amount due on their several bonds, and the relief asked in the complaint." These answers merely set a claim to the bonds referred to, and pray judgment on them. I have carefully searched this transcript containing ten thousand six hundred and seventy six lines; and I cannot find that these answers of Ely, Putnam, and Burke were ever replied to by any one, or that any sort of issue was ever taken on them. Nor does the transcript show that any of the parties to Lindley's suit ever suggested or alleged anything touching the payment or satisfaction of the bonds on which the claims of Ely, Putnam, and Burke were founded. But it appears that afterwards the cause was submitted to the court for trial without a jury; and the court thereupon, among other things, found that all the bonds mentioned in said trust deed, including those held by the complainants, Ely, Putnam, and Burke, and their judgment for fifty-four thousand eight hundred and fifty-five dollars had been fully paid, satisfied, and extinguished; and the court rendered judgment accordingly.

It should be noted that the judgment for fifty-four thousand and eight hundred and fifty-five dollars in favor of Ely, Putnam, and Burke, on which their present suit is founded, and which was rendered on the identical bonds in question, was pronounced November 14, 1857; and that the finding and judgment declaring these bonds and that judgment to have been paid, satisfied and extinguished, occurred in February, 1868, while the present suit was pending in this court.

Under these circumstances, the defendants contend that the finding and judgment of the Floyd Circuit Court in February, 1868, that the bonds and judgment in question had been paid, satisfied and extinguished, estops the complainants to say that their judgment for fifty-four thousand eight hundred and fifty-five dollars rendered on these bonds is valid and unsatisfied.

It is not pretended that the record in the Lindley suit shows that any issue was made touching the payment, satisfaction, or extinguishment of the bonds and judgment un-

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der consideration. Nor do the defendants rest the matter on that ground. But they insist that the finding and judgment without such an issue operate as an estoppel. In *Duncan vs. Holcomb*,¹ it is held that "it is only those matters that are involved in the issues made by the pleadings that are considered *res judicata*." The doctrine of estoppels by records does not apply "to points which came only collaterally under consideration, or were only incidentally under cognizance, or could only be inferred by arguing from the decree."² In *The Duchess of Kingston's Case*, it is settled, "first, that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or, as evidence, conclusive, between the same parties upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point, is in like manner conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither a judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." See the case in 2 Smith's Leading Cases, 424, and notes. From these authorities, and many others, I think the true rule is that to create an estoppel by former judgment, the point in question must either have been admitted on the record, or an issue must have been made on it and decided against the party against whom it is offered in evidence.

But the defendants, appearing to admit the correctness of this rule, have produced parol evidence to prove that on the trial in the Floyd Circuit Court, the parties verbally agreed to let in evidence, under the answer filed, touching the payment and

¹ 26 Indiana, 373.

² *Hopkins vs. Lee*, 6 Wheaton, 109.

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satisfaction of the bonds and judgment in question. I think it is very clear that parol evidence of such agreement is inadmissible. To allow parol evidence in aid of the record in order to establish an estoppel, is not to be tolerated. What has been done in a court of record must be proved by its record; and to prove it by parol would violate the plainest principles of law.

I am of opinion, therefore, that the supposed matter of estoppel set up in this defense does not bar this action.

5. All the defendants, except the city of New Albany and the railroad company, set up a defense deduced from the terms of their original subscription of stock by them to the railroad company, by which it was stipulated that on the happening of a certain event all their subscriptions, except six shares of stock to each of them, should cease to be binding on them.

In support of this defense the following facts are averred in their answers and proved by the evidence:

The said railroad company was incorporated under the general laws of Indiana for organizing railroad companies. These defendants subscribed the articles of association preparatory to the organization of the company. In these articles and in their subscription of stock, it was stipulated that, if the city of New Albany should afterwards subscribe to the capital stock of the company fifty thousand dollars or more, then these defendants should only be held for six shares each of their respective subscriptions; and that the residue thereof should be deemed transferred to the city as part and parcel of its anticipated subscription. These stipulations were provided because all these defendants were residents and property holders of the city; and it was deemed too great a burden on them, to pay both the large subscriptions they were making and also their proportion of the tax that would devolve on them in order to pay the anticipated subscription of the city. This arrangement was agreed to by all parties. Under it the company was organized. Afterwards the city subscribed four hundred thousand dollars to the capital stock of the railroad

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company. Thereupon the company accepted so much of the city's subscription as was necessary for that purpose in lieu of the subscriptions of these defendants over and above six shares each, and discharged each of them from liability to pay on his subscription for more than six shares, which each of these defendants then fully paid. This arrangement has ever since been acquiesced in, and acted on by all parties concerned till the present suit was commenced. And the substance of the whole thing seems to me to have been a substitution of a part of the subscription of the city for the subscription of each of these individual subscribers over his six shares. And it seems to have been a reasonable, equitable, and honest arrangement. And if it was lawful, these defendants are not indebted to the railroad company.

But the complainants contend that this arrangement was unlawful. They insist that it was unlawful, because the general law under which this railroad company was incorporated absolutely requires that, as a necessary prerequisite to an incorporation, fifty thousand dollars, or one thousand dollars per mile of the road, must be subscribed; and that such subscription must be absolute, and not contingent on any condition whatever.

I am inclined to think that, in order to entitle an association of persons to be incorporated under the general railroad law of Indiana, there must be a prior subscription of stock to the amount required, absolute and unconditional. By the record and the evidence in this case, it does not appear, however, that such an amount was not absolutely and unconditionally subscribed by persons other than these defendants. And as it is conceded on all sides that this company was duly incorporated, if a conditional subscription alone of the requisite amount would make the incorporation invalid, it might perhaps be fair to presume that the requisite amount had been subscribed by others than these defendants. As a general rule, it is certain that a conditional subscription of stock is valid under the railroad laws of Indiana. And it would

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seem to be a hard rule to hold that, in any such case, the condition must be rejected as a nullity, and the subscription be deemed valid and unconditional. If a conditional subscription be unlawful, perhaps it would be more reasonable to hold the whole contract void for illegality.

But be this as it may, I think that the most we can make of the matter is this: The proceeding to organize under these conditional subscriptions was perhaps an irregularity. Perhaps, for that irregularity, the state might have interposed by *quo warranto*, and put a stop to the corporate proceedings. But everybody acquiesced in the whole thing. The conditions in the subscriptions under consideration were carried into effect by all the parties concerned at a time when it is not pretended that the railroad company was insolvent. It may be fairly presumed that these conditional subscriptions materially contributed to the inducements which led the city of New Albany to make her large subscription to the capital stock of the company. The whole arrangement was perfected, and has been acquiesced in by all parties. And it is too late now, after the lapse of more than fifteen years from its consummation, to set it aside, and to hold these men liable to the complainants for subscriptions thus disposed of.

I am of opinion therefore that these defendants are not indebted to the railroad company; and that consequently the complainants can have no recovery against them. It follows that, as to all the defendants who are sued as individual subscribers to the capital stock of the railroad company, the bill must be dismissed at the costs of the complainants.

As to the city of New Albany, I am of opinion that the complainants have made out their case.

It is therefore ordered, as to the city of New Albany, that this case be referred to the Master with directions to him to ascertain how much is due to each of the complainants on their judgment for fifty-four thousand eight hundred and fifty-five dollars mentioned in their bill with interest up to the

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time of his report, as also the costs due to them on that judgment; and that he report the same to this court.

The above statement by Judge McDonald that, as to the individual subscribers, the bill would be dismissed, must refer to those subscribers who had duly prosecuted their defense, for two of the defendants, Ezekiel R. and Silas C. Day, were defaulted, and on the enrollment of the decree herein, judgment was entered against E. R. Day for \$4,280, and against S. C. Day for \$3,026, with a provision that any money collected from the Days should be applied in reduction of the decree against the city, and upon full payment by the city no execution should issue against the Days.

To set aside this finding against them, E. R. and S. C. Day filed a bill of review in this court, on the hearing of which before JUDGE DRUMMOND, November Term, 1872, the prayer was granted, and these findings set aside. This decision will appear in its chronological order in subsequent volume of these Reports.

In the appeal by the city of New Albany the Supreme Court held that the laches of the complainants was sufficient to bar the relief asked in their bill, and reversed the decree so far as the city was concerned, and ordered the bill dismissed as to it. *New Albany vs. Burke*, 11 Wallace, 86.

In the appeal by the complainants as against the individual defendants, the Supreme Court affirmed the decree below. *Burke vs. Smith*, 16 Wallace, 390.—[Reporter.

The Skylark.

THE SKYLARK.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1869.

IN ADMIRALTY.

1. RIGHTS OF EXECUTION CREDITOR—CANNOT SELL BANKRUPT'S PROPERTY.—An execution creditor, without leave of the bankrupt court, has no right to sell under his writ after the filing of a petition in bankruptcy against the debtor; and a sale so made passes no title.

2. LIEN—HOW ASSERTED.—The creditor may assert his lien in the bankrupt court, but cannot control the property as against the assignee.

3. CREDITOR CANNOT SELL SECURITIES—COURT WILL RESTRAIN.—A creditor holding security has not an absolute power over his securities, and the court will, on application of the assignee, restrain the creditor from selling them.

In October, 1868, the propeller Skylark was owned by the Lake Michigan Transportation Company. She was attached in the state court, under the foreign attachment law of Illinois, the company being a corporation of Michigan. On the 11th of November, 1868, the Lake Michigan Transportation Company having been served with process in an attachment suit, a judgment *in personam* was rendered against the company, and a general and special execution was placed in the hands of the sheriff. The Skylark had been attached upon the *mesne* process, but was then held upon the final process or execution. The execution did not show any new seizure, but the sheriff sold by virtue of the execution. The company having been adjudicated a bankrupt prior to the sale, the assignee claimed the propeller.

Chas. Hitchcock, for judgment creditor.—As matter of law, when this general execution went into the hands of the

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sheriff, it became a lien upon all the property of the corporation. On the 11th of November, 1868, the execution went into the hands of the sheriff, and subsequently proceedings were instituted in bankruptcy, but the attachment having matured into an execution lien prior to the filing of the petition, the proceedings in bankruptcy do not divest the lien of the execution.

R. Rae and Samuel W. Fuller, for assignee.

DRUMMOND, J.—I do not think the sale was valid. There might have been a lien, but I think the proceedings in bankruptcy vested in the bankrupt court the property of the bankrupt. The creditor could go into the bankrupt court and claim the lien. That should be done, admitting that the lien was a valid one. The assignee has a right to the property subject to the lien. The creditor may hold on to the lien, and require the payment of the money before he relinquishes it, or he may proceed with the execution, with the consent of the bankrupt court, but he cannot control the property as against the assignee.

Where a party has property in his possession, stocks, notes, or securities of any kind, upon which he has made an advance, and undertakes to sell it, the assignee can stop the sale, and prevent the property from being sacrificed. But the court would require the holder to be repaid his advances on the property, whatever they might be. He has not an absolute but a qualified power over the property.

There is force in this consideration; there might have been a very small claim against this vessel under the attachment. It was sold after the petition in bankruptcy was filed. Now by that sale, if the absolute control over the property is acquired, it might be for a very inconsiderable portion of her value.

The sale being invalid, the title still remains in the assignee, subject to the lien of the judgment creditor. Decree accordingly.

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If there is a valid lien under the state laws, it will follow the property into the court of bankruptcy, and will be there recognized, protected and enforced. The principle, supported by authority, seems to be that whenever the law gives a creditor the right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of the debt; but the assignee, not the creditor, must determine what course shall be pursued in regard to it. *In re Wynne*, 4 Bankruptcy Register, 5.

Where the sheriff has made a levy on execution, before the commencement of the proceedings in bankruptcy, and the validity of the judgment upon which the execution issued is not questioned, he may be allowed to sell, unless the sale would be injurious to the general creditors. *Pennington vs. Sale and Phelan et al.*, 1 Bankruptcy Register, 157; *Jones vs. Leach et al.*, *Id.*, 165; *In re Bowie*, *Id.*, 185; *In re Wilbur*, 8 *do.*, 71.

The commencement of proceedings in bankruptcy transfers to the bankrupt court the jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith, and operates as a supersedeas of the process in the hands of the sheriff, and as an injunction against all other proceedings than such as might be had under the authority of the bankrupt court, until the question of bankruptcy is disposed of. *Jones vs. Leach, et al.*, 1 Bankruptcy Register, 165.

The jurisdiction of a district court of the United States, sitting as a court of bankruptcy, is superior and exclusive in all matters arising under the state statutes. No court of an independent state jurisdiction can withdraw the property surrendered, or determine, in any degree, the manner of its disposition. *In re Barrow*; *re Loeb, Simon & Co.*; *re Winter*, 1 Bankruptcy Register, 125.

Where the property would be sacrificed by a sheriff's sale, but by proper management could be sold for a sum sufficient to pay the judgment creditor in full and leave a balance for the general creditors, an injunction will be granted. *In re Schnepf*, 1 Bankruptcy Register, Supplement xli.

The bankrupt court has power, where a judgment was obtained in a state court, and execution issued thereon, and levy made by the sheriff on debtor's property before he filed his petition in bankruptcy, to allow the goods to be sold under the execution, or to enjoin proceedings thereunder, and to order the assignee to take possession and sell the goods, with leave to the judgment creditors to apply for an order to have their liens satisfied out of the proceeds. *In re Schnepf, supra*.

A mortgage creditor may, however, upon notice of the assignee, apply to the court to have the mortgaged property sold. *In re Bigelow*, 1 Bankruptcy Register, 186; *Davis vs. Carpenter*, 2 *do.*, 125; *In re Ruehle*, *id.*, 175. *In re Smith*, *id.*, 97; *In re Frizelle*, 5 *do.*, 122.

Some of the state courts have held that where a sheriff had seized the property under final process, the ordinary bankruptcy proceedings do not interfere with the proceedings by the sheriff, and that the sheriff should

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proceed to sell the property unless prevented by some proceeding instituted in the bankruptcy court. *Sharman vs. Howell*, 40 Georgia, 257; *Fehley vs. Barr*, 66 Pennsylvania, 196. Such, however, is not the ruling of the federal courts.

A sale made, whether under judgment or mortgage, without the consent of the bankruptcy court, is subject to be set aside by that court. *Davis vs. Anderson*, 6 Bankruptcy Register, 145.

But where execution on final judgment has been levied prior to the commencement of bankruptcy proceedings, the possession by the officer cannot be disturbed by the assignee; he is only entitled to the residue after satisfying the execution. *Marshall vs. Knox*, 16 Wallace, 551.—[Reporter.

JOSEPH D. SIDENER, ASSIGNEE, vs. BERNHARD
KLIER.

DISTRICT COURT.—DISTRICT OF INDIANA.—JULY, 1869.

IN BANKRUPTCY.

FRAUDULENT MORTGAGE.

More than four months, and within six months, before a petition for adjudication of bankruptcy was filed, the bankrupt mortgaged all his property to a creditor to secure *bona fide* debts and liabilities.

Held, that, in order to entitle the assignee to recover from the mortgagee the property thus mortgaged, it must be proved that, at the time of the execution of the mortgage, the mortgagor was insolvent, or in contemplation of insolvency or bankruptcy; that the mortgagee had then reasonable cause to believe that such was the fact; and that such mortgage was made with a view to prevent the mortgaged property from coming to the mortgagor's assignee in bankruptcy, or to prevent the same from being distributed under the Bankrupt Act, or to defeat the object of, or delay, hinder, impair, or impede the operation of, the Bankrupt Act, or to evade some of

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its provisions. The mortgage cannot be avoided simply because it gave a preference to the mortgagee.

Elliott & Holstein, for complainant.

Edward T. Johnson, for defendant.

McDONALD, J.—This is a bill in chancery filed by Joseph D. Sidener, assignee in bankruptcy, against Bernhard Klier.

The bill charges that, on the 22nd of May, 1868, Ernest Degelow filed his petition in this court to be adjudged a bankrupt; that he was afterwards so adjudged; and that the complainant has been duly appointed his assignee.

The bill further states that, on the 21st of January, 1868, the bankrupt mortgaged all his property to the defendant Klier, as security for a pretended indebtedness; that Degelow was, at the time, insolvent; that Klier had then reasonable cause to believe, and did believe, that Degelow was insolvent; and that the mortgage was made with a view to prevent the mortgaged property from coming to the hands of the assignee in bankruptcy of Degelow, and to prevent the same from being distributed under the Bankrupt Act, and to defeat, impair, hinder, delay, and impede the operation of that act.

The answer of Klier denies all the material charges in the bill; and alleges that the mortgage was made *bona fide* to secure honest debts due to him by Degelow, and to indemnify him as surety on divers notes for Degelow. A common replication to the answer is filed; and numerous depositions have been taken.

The case is now submitted for final hearing and decree on the bill, answer, and depositions.

The only question of any difficulty to decide, is one of fact, namely, Does the evidence establish the case made by the bill?

I am satisfied by the evidence that, at the time when the mortgage in question was made, Degelow was insolvent; that Klier knew him to be so; and that Klier, in procuring the mortgage, intended to obtain a preference over the other

creditors of Degelow. But this mortgage was executed more than four months before Degelow filed his petition for adjudication of bankruptcy. Now, in order to defeat the preference in such a case, the 35th section of the Bankrupt Act, requires that the preference shall have been obtained within four months next before the filing of the petition for adjudication of bankruptcy. Had this mortgage been executed two days later than it was, I should have felt no difficulty in pronouncing it fraudulent and void under the Bankrupt Law. But, as the matter stands, I cannot hold it void merely because it was intended to give a preference to the mortgagee.

The latter clause of said 35th section, however, provides, that "if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, transfer, assignment, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of, this act, the sale, assignment, transfer, or conveyance shall be void," &c. Under this provision the lapse of time does not bar the complainant's claim, for the mortgage was made less than six months before Degelow applied to be adjudged a bankrupt.

But in proceedings under this clause of the 35th section, as I construe it, the complainant, in order to succeed, must prove that the mortgagor, at the time of executing the mortgage, was either insolvent or contemplated insolvency or bankruptcy, and that the mortgagee, at the time, had reasonable cause to believe this fact. And, in addition to this, it must be proved that the mortgage was made with a view either to

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prevent the property mortgaged from coming to the assignee in bankruptcy, or to prevent the same from being distributed under the Bankrupt Act, or to defeat the object of, or in some way impair, hinder, impede, or delay the operation of, the act; or to evade its provisions. Both these propositions must be proved. The first of them, in my opinion, as already intimated, is proved. But, as to the second proposition, standing as it does on several alternatives, yet all relating to attempts to defeat the Bankrupt Act, I do not believe that any one of these alternatives is proved. I must, indeed, presume that the mortgagor and mortgagee perfectly understood all the provisions of the Bankrupt Law. But I cannot perceive from the evidence that in the execution of the mortgage either of them had any view to any of the provisions of that law. As I regard the evidence, I think that Klier, perceiving that Degelow was in pecuniary trouble, feared that he might at some future time be broken up; that, to make himself secure, and to obtain a preference over others in the event of such a breaking up, he thought it prudent to demand a mortgage; and that, on such demand, Degelow very reluctantly executed the mortgage without any thought, in so doing, of violating the Bankrupt Law, or of doing any other dishonest act; and I think that the thought of becoming a bankrupt never entered into his mind till some four months afterwards.

With this view of the case, I must find that there is no equity in favor of the complainant. The bill is therefore dismissed at his costs.

Bosseau vs. O'Brien.

PETER BOSSEAU vs. CORNELIUS O'BRIEN.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1869.

IN EQUITY.

1. STATUTE OF FRAUDS—AUTHORITY TO SELL REAL ESTATE.—Authority to an agent to sell real estate must be clear and distinct, of such a character that a fair and candid person must see without hesitation that the authority was given.

2. An answer to a letter from a real estate agent asking for authority to sell lands, "I will sell" on terms specified, does not confer the authority on the agent to make a contract of sale.

3. Correspondence between the real estate agent and the owner, concerning the lands and the price and the terms of sale, do not constitute authority to the agent to make a contract of sale, even on the terms specified by the owner.

4. EARNEST MONEY.—The receipt of earnest money by the assumed agent does not bind the principal as a part performance.

5. RATIFICATION, to be effectual, must be unequivocal, and with full knowledge of all the facts.

6. Failure to answer letters or inquiries from the agent as to the consummation of the sale do not constitute a ratification.

7. CONSTRUCTION OF AUTHORITY.—An authority to sell must be strictly construed, and the purchaser must show that the contract complies fully and entirely with the authority.

8. An agent making a contract of sale should forward a copy of the contract to the principal.

This was a bill filed by Peter Bosseau for the specific performance of an alleged contract of sale made by the defendant with the complainant in August, 1864, for the S. $\frac{1}{2}$, Sec. 25, 32 N., R. 12 E., in Kankakee county. The facts appear in the opinion.

John Woodbridge, Jr, for complainant.

I. N. Stiles, for defendant.

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DRUMMOND, J.—The question is whether there was a contract of sale made at that time of such a character that the plaintiff is entitled to have the contract performed.

The defendant was at that time the owner of the land. The bill sets forth that a contract was made, and the answer denies it, and insists upon the statute of frauds. The plaintiff seeks to make out the existence of the contract through a sale by James McGrew as the agent of the defendant, and the testimony consists mainly of the letters and correspondence between Mr. McGrew and the defendant, and the deposition of Mr. McGrew himself.

It is proper, in the first place, to look at the written evidence, about which, of course, there can be no mistake. The first is a letter from Mr. McGrew to the defendant, dated December 28, 1863. It should be observed that McGrew resided at Kankakee city and the defendant at Lawrenceburg, Indiana. In that letter Mr. McGrew informed the defendant what the amount of taxes upon his land was, and stated to him a willingness on his part to pay the same, also asked him whether the lands were for sale and at what price, and informed him he was a real estate agent and willing to serve him. The defendant, on the 29th of January, 1864, acknowledged the receipt of this letter, and stated to Mr. McGrew that Mr. A. B. True had done business for him and attended to his taxes. He asks whether the lands in his neighborhood are salable, and at what price, and he makes this remark at the end of his letter: "Should I make up my mind to sell the whole or a part of my land, I may take occasion to avail myself of your services." Mr. McGrew answers this letter on the 5th of February, in which he says, "There is begining to be some sale for real estate in the county," telling him that he should think his lands ought to sell for five to eight dollars an acre; that there is a great deal of unimproved land offered for sale, and that it is difficult to realize on that kind of land. On the 22nd of March McGrew writes to the defendant and asks him at what price he will sell two or three of his quarter sections of land;

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tells him if he could get ten dollars an acre on what was called canal terms, being one-fourth down, the balance in one, two, and three years, with six per cent. interest annually, in advance, that it would be a good sale. The language is "would be a big sale." On the 14th of May the defendant replies to this letter, saying that he would not like to take ten dollars an acre for the land referred to by Mr. McGrew; but he says, "I have two quarter sections near Manteno [the land in controversy,] which I will take ten dollars per acre for on the time and terms you propose."

It appears by the testimony of McGrew that when he received this letter he advertised the land for sale. On the 20th of May, Mr. McGrew answers this letter, and gives him a description of the land which he, the writer, understood the defendant owned, and among which tracts are the S. E and S. W. $\frac{1}{4}$, Sec. 25, and says that he thought he could sell those tracts and another one, being the ones near Manteno, at ten dollars an acre, but he had been so long in getting an answer that the parties to whom he thought he might sell might have bought elsewhere. He says, "Please answer, and state if you still own the lands as above described. If so, shall I sell the three first-named tracts at ten dollars per acre if I have an opportunity?" two of which tracts were the south half of section 25; so that there was a distinct question put by Mr. McGrew to the defendant whether he should sell this tract of land.

This letter does not seem to have been answered by the defendant until the 2nd of July, when he says, "I will sell the two quarter sections in section 25, 32 north, range 12 east, at ten dollars per acre on the terms stated in your former letter. These tracts are those next to Manteno.

It is to be observed that the question had been distinctly put, "Shall I sell." The defendant does not tell him he may sell, but he says, "I will sell" these tracts of land. This is all there was of a written character, up to the time that the transaction took place between McGrew and plaintiff—indeed only

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authority, oral or written, upon which it could be said Mr. McGrew had a right, as representing the plaintiff, to dispose of this land.

The question is whether, upon this evidence, as it stands, there was any written authority to sell the land.

It seems to me clear that there was not. He had asked for the authority. The authority had not been given, but he had said, "I will sell the land," I do not authorize you to sell it, but "I will sell" it on the terms that you name.

On the 11th of August, 1864, a bargain was made between the plaintiff and Mr. McGrew of which this writing is the evidence:

Received of Peter Bosseau one hundred dollars to apply as part of the first payment on the south half section 25, 32, R. 12 E. sold to him this day at ten dollars per acre, on canal terms, balance of first payment to be made as soon as contract is made which will be within thirty days, payments to be as follows: one-fourth down, balance in one, two and three years, with interest at six per cent. annually, in advance.

CORNELIUS O'BRIEN,
By James McGrew, Agent

And on the same day McGrew wrote to the defendants stating that he had sold the tract of land at ten dollars an acre on canal terms as he, the defendant, "had instructed him" with the request that the defendant would send a warranty deed properly executed, and that he would return the notes and mortgage for the deferred and the cash payment. On the next day, August 12th, he wrote to the defendant, stating that he had forgotten to name the party to whom the deed should be made and with whom the transaction had taken place; and in this letter he names the plaintiff Peter Bosseau and the consideration money—three thousand two hundred dollars.

To these letters he received no reply from the defendant, and it is to be remarked that he did not tell him the whole of the arrangement that had been made between him and the plaintiff; in other words, he did not send him a copy of the re-

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ceipt which he had given, as the agent of the defendant, to the plaintiff. One quarter of the cash had not been paid, but only one hundred dollars.

Not having received any reply to these letters of August 11th and 12th, he wrote again on the 12th of September to the defendant, in which he recapitulated that he had on the 11th of August sold for him the south half section 25, at ten dollars an acre on canal terms as he had been "instructed to do" by the defendant. He repeats that he had sent for a warranty deed, and refers to the fact that he had not given the name of the purchaser and that might be the reason why the deed had not been sent, and in this he reiterates the request that a deed should be forwarded at his earliest convenience, and says that he will then send the cash payment and notes and mortgage. On the 9th of November he writes again to the defendant, stating that he had expected to see him before that time.

Between the date of these last two letters he had seen the defendant. He had gone to Lawrenceburg and had an interview with the defendant. That was in October, and he says, "I called the defendant's attention to the matter of making the deed to Bosseau of said lands. He stated that he and his wife would be at Chicago within the next two or three weeks, and that he would then come down to Kankakee, execute the deed, and have the mortgage and notes executed to them and the matter closed up."

The statement of the defendant in relation to what took place at that time is, that he "distinctly and emphatically disavowed any connection whatever with this act of McGrew as his agent.

On the 1st of December, the defendant wrote McGrew a letter in which he says, among other things, "As soon as I feel better I will come out; until which time I will postpone further action as to making a deed, etc. If you can inform the parties who intended to purchase," etc. Nothing being done, the defendant not having been to Kankakee nor seen

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McGrew, on the 30th of January, 1865, the latter again writes to the defendant, introducing Mr. Comstock, who now first comes upon the scene, to whom he had intrusted the notes and mortgage and the cash payment that had been made, with a request that he would hand the whole over to the defendant, and in this letter he reiterates the expression so often used in this correspondence, "This is the land I sold for you last summer at ten dollars per acre, on canal terms, as you authorized." Comstock's deposition has been taken, and he states that he went to Lawrenceburg, and that he tendered the money and notes and mortgage to the defendant, and that they were declined; and defendant says that he distinctly refused to have anything to do with it in any way, denying all authority on the part of McGrew to make sale of his land. The money, notes and mortgage thus being refused by the defendant, were returned to Mr. McGrew, and were produced from his possession when his deposition was taken. The deed, notes and mortgage are added as exhibits to his deposition. The money, the one hundred dollars which was paid on the 11th of August, still remains with Mr. McGrew. The remainder of the cash payment was not received by Mr. McGrew, and of course remains with the plaintiff.

There are three notes which, as now written, bear date August 11, 1864, payable one, two and three years after date, respectively for eight hundred and ninety-six dollars, eight hundred and forty-eight dollars, and eight hundred dollars. signed by Peter Bosseau. The testimony of McGrew is that these notes and the cash, were tendered within thirty days. The date of the notes was originally January, 1865. That is admitted by Mr. McGrew in his testimony, and it is manifest, upon an inspection of the notes, that such was the fact. The original date is erased, and August 11, 1864, written over the erasure; what day in January the notes bore date is not perhaps very clear, but it is certain that the original date was January, 1865; in fact, it must have been January 30 or 31, 1865, because the mark of the "3" is very distinct in all the notes. The same is true of the date of the mortgage.

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The only serious question that I can see in the case is, whether the defendant ever ratified this act of McGrew as his agent. McGrew did make the sale; that is, he made the contract. Was it ratified by the defendant? I do not think that it was; neither do I think that the terms upon which the defendant said he would sell the land, even if we can suppose that there was an implied authority to sell, were complied with in the contract. A quarter cash was not paid at the time that the contract was made. If the plaintiff relies upon the contract as binding, he must show that the contract was made in conformity with the instructions of defendant; and if it was a complete contract, then those instructions must have been complied with fully and entirely; and it cannot be pretended, I think, even if we concede that he was instructed to sell in this ambiguous sort of a way, that the instructions were complied with. He clearly was informed that McGrew had sold the land for him but, as I have said, he was not told the precise terms of the contract. He was not told, in other words, that only one hundred dollars earnest money had been paid, and that the remainder was to be left until the deed was obtained. A copy of the receipt was not forwarded to him as it ought to have been. No answer was made to these letters. That did not look like ratification. The deed was not forwarded. That certainly did not look like ratification. The defendant did not manifest any desire to receive the cash payment. The only doubtful circumstance is a paragraph in the letter of December 1, 1864, but, fairly construed, can that be treated as a ratification of this act of McGrew? Does it look as though the defendant understood there was a certain contract binding upon him, with which he had anything more to do than simply to carry out its terms as agreed upon between McGrew and the plaintiff? I think not. He says, "I will postpone further action as to making the deed," of which you can inform parties "who intend to purchase." Not "who have purchased," but "who intend to purchase." He clearly does not treat it or regard it as a contract complete

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and finished, and in relation to which all he had to do was to make a deed and receive the money, notes and mortgage.

The fair interpretation of this whole arrangement, I think, is this, that McGrew, being a land agent, was very anxious to sell all he could, as by sales he obtained his commission and his living. The very moment he was told defendant was willing to sell this land, he advertised it, claims that he had authority to sell, repeats again and again that he was authorized to sell, and sells, presuming that the defendant would ratify the act, and it being understood, that there was a certain something to be done by the defendant in which he was to have the power of choice and determine as to the nature and character of the transaction.

Independent of the writings there is nothing but the testimony of Mr. McGrew and whatever would have a bearing upon the contract made with the plaintiff, of course it would be affected by the statute of frauds. All that the plaintiff can rely upon is his written contract. There is no pretence that there was or could be, an oral contract with such payment and part performance as will take it out of the statute of frauds. Whatever possession there was, was unknown at the time; and so far as the evidence shows, not authorized by the defendant. The defendant never received any portion of the money, and there was not, therefore, what could be properly called part payment and the possession of the land. I say it must have been the understanding of the parties that there was some action to be done on the part of the defendant; that it was incomplete and unfinished because of the testimony relating to the notes and the mortgage. They were not executed until January, 1865—nearly six months after the transaction had taken place. The explanation given by Mr. Comstock of the alteration in the date of these notes, which McGrew admits he made, was that the defendant ought to have interest from the date of the contract; but while that may be true, and a sufficient explanation of the erasure and the new date to the notes, still it also demon-

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strates that the transaction was unfinished on the 11th of August, 1864.

It is nothing more than fair that we should take Mr. McGrew's explanation of his own conduct. From this it will appear that although he said he was authorized to make this sale, yet that it was an inference of his. He nowhere says in his deposition that he was authorized, but he presumed or supposed that he was authorized. He is asked whether he was authorized by O'Brien to receive the one hundred dollars.

"A.—I considered myself so.

Q.—Give your reason for considering yourself authorized by Mr. O'Brien to receive that payment of one hundred dollars.

A.—From my correspondence with Mr. O'Brien, the fact that he knew I was acting as real estate agent, and that I had written him once that I had an offer for some of his lands, which he declined but in reply stated that he would take ten dollars per acre for this on the terms that I had specified as connected with the other offers."

That is his explanation. Compare it with the facts. O'Brien had told him he would take ten dollars an acre for this half section of land. After he had told him so he had asked him, "Shall I sell for you" on such terms? No reply. He at the time did not consider it authority to sell, but he asked for authority. That the authority was given, was an inference of Mr. McGrew, not warranted, as I think, by the facts.

It is sought now to make out a ratification. I think the facts do not warrant the conclusion that there was a ratification of this unauthorized act of Mr. McGrew.

This concerns real estate by which the defendant is to be deprived of his title to the land. The evidence should be clear and distinct, and of such a character that there could not be any hesitation in the mind of a fair and candid person, when scanning it, in coming to the conclusion that the authority was either given or that the act which was done by the party was ratified as the act of the principal.

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It will be observed that McGrew, after being subjected to a pretty rigid cross-examination, when asked when the notes and mortgages were tendered to him, says that they were tendered immediately after their execution. That must have been the latter part of January or the first of February, 1865.

I have thus gone through with all the evidence that bears upon the question, and have come to the conclusion that there was no authority given to McGrew by the defendant to sell this land, neither has there been any ratification by the defendant of the contract made by McGrew on the 11th of August, 1864.

I have thus far said nothing of the interest which Mr. Comstock had in this property, or of the circumstances of the alleged inadequate price for which the property was sold. Mr Comstock was equally interested with the plaintiff in this contract, advanced some of the purchase money, and even one-half of the hundred dollars that were originally paid, and helped to make up the tender that was offered to the defendant by Comstock in February, 1865; but I lay no particular stress on these additional facts. They might become material under another aspect of the case.

The bill will be dismissed.

For a full discussion of the question, What is sufficient to constitute an agency, see *McConnell vs. Brillhart*, 17 Illinois, 860, where, on full review of the authorities, it is laid down as the rule that no form of language is necessary, and that notes and memoranda indicating such intent are sufficient. Fry on Specific Performance, §353, *et seq.*

The contract need not be on one piece of paper nor entered into at one time, but several papers may be connected. *Emay vs. Gorton*, 18 Illinois, 488.

The English cases hold that a contract may be made out from correspondence. *Stratford vs. Bosworth*, 3 Vesey & Beames, 841; *Huddlestons vs. Briscoe*, 11 Vesey, Jr., 588; *Western vs. Russell*, 3 Vesey & Beames, 187.

Ratification will be presumed on slight grounds, and will take a case out of the statute of frauds. Story on Agency, §§244, 445; *MacLean vs. Dunn*, 4 Bingham, 722. But must be with full knowledge of all material facts. *Awings vs. Hull*, 9 Peters, 608; *Hays vs. Stone*, 7 Hill, 128.

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If a party places his refusal to execute a contract on a different ground, he cannot afterwards deny the agent's authority. *Harding vs. Parshall*, 56 Illinois, 219.

A party rescinding a contract must return or tender whatever he has received under it. *Peoria M. & F. Ins. Co. vs. Botto*, 47 Illinois, 516, affirming *Smith vs. Doty*, 24 do., 165, and *Buchanan vs. Horney*, 12 do., 336; *Bowen vs. Schuler*, 41 do., 193; *Murphy vs. Lockwood*, 21 do., 619.

The party against whom a rescission is sought must be placed *in statu quo*. 1 Hilliard on Vendors, 33, *et seq.*; 1 Sugden on Vendors, 306; *Johnson vs. Jackson*, 27 Mississippi, 498; *Aetna Ins. Co. vs. McGuire*, 51 Illinois, 342; *Kinney vs. Kiernan*, 49 New York, 164, affirming *Wheaton vs. Baker*, 14 Barbour, 594; see also *Masson vs. Bovet*, 1 Denio, 74; *Moyer vs. Shoemaker*, 5 Barbour, 322, 323, citing many authorities; also *Voorkies vs. Earle*, 2 Hill, 292, 293; *Coolidge vs. Bingham*, 1 Metcalf, 550; *Longworth vs. Taylor*, 1 McLean, 395.

This is true though the article received was of inconsiderable value. *Connor vs. Henderson*, 15 Massachusetts, 321; *Ayers vs. Hewett*, 19 Maine, 281; *Boston vs. Nichols*, 47 Illinois, 356. Or even the note of the other contracting party. *Kimball vs. Cunningham*, 4 Massachusetts, 502.

Authority to an agent is to be construed to include all necessary or usual means of executing it with effect. Paley on Agency, 189: 1 Parsons on Contracts, 57; Story on Agency, §58.

As to what is sufficient authority to an agent to make a valid contract for the sale of real estate, consult *Bissell vs. Terry*, Illinois Supreme Court, September Term, 1873, opinion filed Jan. 30, 1875.—[Reporter.

Taylor vs. Bemis.

TAYLOR vs. BEMIS.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY,
1864.

IN EQUITY.

1. SALE OF INTEREST IN TRADE-MARK.—A court of equity has no power to decree the sale of a partner's interest in a firm brand or trade-mark. Such an interest is too intangible.

2. COURT WILL NOT SELL AN INTANGIBLE INTEREST.—Before decreeing a sale of an alleged interest of a partner, the court must be satisfied that the object or interest sought to be sold has some substantial, tangible value.

The bill in this case alleged the recovery of a judgment in the Superior Court of Chicago in favor of plaintiffs against H. V. Bemis; that an execution was returned not satisfied, and that the judgment was still due and unpaid; that Bemis was engaged in business in Chicago, as a member of the firm of Downer, Bemis & Co., manufacturers and dealers in ale, his interest in which firm this bill designed to reach. The bill alleged that Washington Smith held the property of Bemis under a mortgage, and that this mortgage was only a pretended mortgage and made to cover up Bemis's property.

Answers were filed by Bemis, Downer, Washington Smith and others, admitting some of the facts alleged in the bill, but denying that Bemis had any interest or property which could be levied upon.

E. S. Smith, for complainant.

F. B. Peabody, for defendant.

DEUMMOND, J.—The proof shows Bemis was engaged in

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a partnership with Mr. Downer, under the firm name of Downer, Bemis & Co., agents and vendors of ale, and that they carried on a very considerable business—the manufacture and sale of ale; and it also appears that the brand of Downer, Bemis & Co. had acquired a certain reputation, and it is claimed that the interest of Bemis in this brand is subject to the disposition of a court of equity, in order to enable the plaintiffs to recover a part if not the whole of their judgment. This is the first point made by the plaintiffs' counsel, which affects the interest of Bemis and is called the trade-mark of Downer, Bemis & Co., as manufacturers and vendors of ale.

It is, secondly, claimed that Bemis had an interest in the assets of the firm of Stauver, Bemis & Murray, that formerly transacted business in Cleveland before Bemis came to Chicago, and that it is subject to the disposition of a court of equity, in order to enable the plaintiffs to realize their judgment.

These are the grounds on which the plaintiffs ask for a decree, and I do not think either of them is tenable.

First. As to the right of the court to order the sale of the interest of Bemis in the brand or name of Downer, Bemis & Co., agents and manufacturers and vendors of ale: Downer says in his examination that he and Bemis, not Bemis alone, established the name together. He also says that he had no more right in the name than Bemis. It is true that he says he has no interest in the name, but that is merely his opinion, and he expresses the same of Bemis's interest. The interest of Bemis would be merely his right to a part of the name or brand, and I cannot see that he has any distinct, tangible value separate from its connection, which is the subject of sale or upon which the decree of the court can act. One of the arguments of plaintiffs' counsel is that Downer himself admits he has no interest in the name, and therefore the conclusion is that Bemis has all the interest. It is clear from the proof that Downer has just as much interest as Bemis. They both established the name or brand together;

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they both carry on the business together; and he (Downer) says in his testimony that he has no interest, and he thinks that Bemis has none.

There do not appear to be any special circumstances in the case to authorize the court to decree the sale of the indefinite, intangible interest of Bemis in this mere name or brand. It is too shadowy a right for the court to interfere. The court cannot see distinctly that there is any substantial interest which is the subject of sale, because, as I have already said, the interest of Bemis would be his right to a part of the name or brand and no more, and of course it would be only a company interest, whatever that might be, which might or might not be of some value. It does not affirmatively appear that it is of any distinct or tangible value.

Second. This same principle is applicable to the interest of Bemis in the partnership of Stauver, Bemis & Murray. The court has no means of knowing whether the separate interest after the settlement of the firm is of any value whatever, and I think a court of equity ought to know before making a decree in such a case that there is some tangible interest which can be sold which would be of some value. Here it rather affirmatively appears it would be of no value whatever.

The bill will be dismissed.

Vorhis vs. Forsythe.

VORHIS vs. FORSYTHE.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH,
1864.

1. BREACH OF COVENANT.—It is not a breach of the covenant of warranty of seizin to show a conveyance by the defendant's grantor subsequent to the conveyance to defendant; it should be alleged that there was a valid and subsisting title in the grantor at the time the deed was made, upon which the breach is alleged.

2. TAX DEED.—A judgment for taxes, sale, and tax deed, constitute a breach of the covenant, and it is not a good plea that the sale was not valid.

Action on covenants of warranty and seizin, and defendant demurs to breaches. The pleadings are stated in the opinion.

DRUMMOND, J.—In this case the defendant sold to the plaintiff certain lots in Peoria. The deed contained a covenant of warranty of seizin, of a good right to convey, and that the land was free from incumbrance. The plaintiff, on the ground that there was a breach of the covenants, has brought an action against the vendor upon the covenants that the vendor was lawfully seized of the premises and had a good right to convey, and that they were free from incumbrance, and has set forth various breaches of the covenants.

The first is that one Bogardus had a right of pre-emption on the land, and that having this right the land was purchased of the United States, and a patent was granted to him on the 5th day of January, 1838. This is claimed to be a breach of the warranty that the land was free from incumbrance. The plea alleges that this was only an apparent und not a real title in Bogardus. I think this is an answer to this breach, for the reason that it does not appear upon the

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face of this averment, that it was in itself, and necessarily, an incumbrance upon the land.

The ground taken by counsel is, that although the Government of the United States may have conveyed the land to the party through whom the defendant claims, yet having conveyed it afterward to a third person and given a title of record, that constitutes an incumbrance. I do not think it follows that it is an incumbrance within the meaning of the warranty. The effect of it would be this, that if A granted land to B and afterwards granted it to C, that the grant of the land to C would be an incumbrance, notwithstanding A had previously granted it to B. It must appear on the face of the declaration that it is necessarily a burden or incumbrance on the land. I do not think that appears, or if it does it is done away with, by the answer given to the breach.

Then, as to the other plea, I think that is also sufficient; that he had a good right to sell and convey the land.

The allegation now is that the pre-emption title of Bogardus was, and still is, a valid title at law and in equity.

The only question is whether this averment is sufficient to show that there was a valid subsisting and outstanding title. There is some doubt, perhaps, whether the true construction of it is that there was at the time a valid subsisting title in Bogardus. We are inclined to think that the pleader had better set forth in whom there was a valid subsisting title, so as to show that there was an outstanding title. If the necessary construction of this averment is that there was a subsisting title in Bogardus, then it would be good. In order to avoid all misapprehension, I think the pleader had better state that there was a valid and subsisting title in some person at the time the deed was made upon which the breach is alleged.

The other breaches in the declaration are substantially that the land was taxed by the state, that it was sold for the non-payment of the taxes, judgment obtained, and a deed executed. An objection was taken to the declaration on the ground that

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it was not averred that this tax sale was valid. The court overruled the objection, for the reason that it appeared *prima facie* that it was.

The answer as put in now is that this was not a valid sale. Admitting that to be true, is it a bar to the action? It is claimed that a tax sale unwarranted by law, although it might be under a judgment followed by a deed, does not in point of fact constitute an incumbrance on the land within the meaning of the clause in the deed that it was free from all incumbrance. Did it in law constitute technically an incumbrance? I am inclined to think it did, because it appears to be a burden upon the land, and it is better to hold in this way and to allow the other questions to arise on a claim for any damages which the party is entitled to cover.

I think there is a good deal of learning on this subject and some conflict in the authorities, but it strikes me when a man buys a piece of land from another and the vendor warrants it free from all incumbrance, the true meaning of it is, that there should be nothing on the land, neither burden nor tax. Take the case of taxes. Now the tax may never ripen into a real incumbrance, and yet the courts have held it is a breach of that warranty which declares the land is free from incumbrance. Take the case of dower. It may never ripen into an incumbrance, yet the courts have held it a breach of the warranty.

The question comes up when a party seeks to recover on a breach of the warranty, whether there is any real damage or not, whether there has anything been given or paid for dower, or whether dower has been set apart, or whether taxes have incumbered or clouded the title and the party has been obliged to pay anything to free the land from the burden. Now it might happen in this case that the judgment and precept and the sale of the land for taxes might not be of such a character as to constitute a title. Most of us who have much experience in tax sales know that a great majority of them are invalid, and yet no prudent man would like to have such a bur-

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den as this stand upon his land, and he might feel it his duty to relieve it, and it would be competent for him to do so, or he might go into equity to relieve the land from this apparent burden. If obliged to do that I think there can be no doubt he might call upon the warrantor to respond to him in damages. I therefore hold that the pleas which aver that these sales which were made under the judgments were invalid, do not constitute technically a bar to the action, but it is still maintainable; but it is not necessary to hold that the rule would apply to a title set up without judgment or precept.

The second breach now states that a portion of this property covered by the deed was assessed for taxes; that it was sold under a judgment obtained for the non-payment of the taxes, and that a certain party became the purchaser, and a deed was made for the premises; and there is an averment that at the time of executing said covenant by said defendant one N. H. Burch was in actual possession of said lot, etc. This, I think, establishes *prima facie* that there was a valid subsisting incumbrance by showing that there was an assessment of the land for non-payment of taxes; that there was a judgment of a court, and that there was a precept, sale and deed; that there was a party actually in possession under that deed, claiming possession of the land. That, I think, is a breach of the warranty.

There is an objection to the third breach, and here the same remark applies. The only averment is that there was a deed executed to O'Gray, which deed was recorded, and that the record was a matter of public notoriety in the county of Peoria. What we want is that there should be an averment in this breach, alleging that there was an outstanding title in some person at the time the deed was executed.

The ninth and eleventh breaches are bad, for the reason that it does not affirmatively appear on their face that there was a valid subsisting incumbrance upon the property at the time the deed was executed.

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For a definition of incumbrance, and what are deemed such, see Rawle on Covenants for Title, 94 *et seq.* (Fourth Ed.); 2 Greenleaf's Evidence §242; *Prescott vs. Trueman*, 4 Massachusetts, 627.

Right of dower, whether inchoate or otherwise, is an existing incumbrance amounting to a breach of this covenant. Rawle on Covenants for Title, 96 and note 4; *Shearer vs. Ranger*, 22 Pickering, 447; *Porter vs. Noyes*, 2 Greenleaf (Me.), 22; *Runnells vs. Webber*, 59 Maine, 488; *Russ vs. Perry*, 49 New Hampshire, 547; *Carter vs. Denman*, 3 Zabriskie's Law, 260; *Jeter vs. Glenn*, 9 Richardson's Law (S. C.), 376; *Henderson vs. Henderson's Executors*, 13 Missouri, 151; *Hatcher vs. Andrews*, 5 Bush (Ky.), 561; *McAlpin vs. Woodruff*, 11 Ohio State, 120.

Even a possibility can be an incumbrance *Anonymous*. Sir Francis Moore's Reports, 249 pl. 393; *Haverington's Case*, Owen, 6.

The plaintiff must not merely negative the words of the covenant, but set forth an incumbrance in his declaration. Rawle on Covenants, 114, and note 2; *Marston vs. Hobbs*, 2 Massachusetts, 433; *Bickford vs. Page*, *Id.*, 455; *Mills vs. Catlin*, 22 Vermont, 98; *De Forest vs. Leste*, 16 Johnson, 122; *Shelton vs. Pease*, 10 Missouri, 473. But it is advisable to set it forth only substantially, to prevent a variance. For illustrations see *Foster vs. Pierson*, 4 Term Reports, 617; *Dewall vs. Craig*, 2 Wheaton, 45; *Morgan vs. Smith*, 11 Illinois, 200.—[Reporter.

Denniston vs. Chicago, Alton & St. Louis R. R. Co.

DENNISTON, *et al.* vs. CHICAGO, ALTON & ST. LOUIS
R. R. CO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL,
1864.

IN EQUITY.

1. CLAIMANTS AGAINST INSOLVENT RAILROAD CO.—Claimants for materials furnished an insolvent railroad company are not entitled to payment out of a fund in court arising from a sale of the corporate property at the instance of mortgage bond-holders, until the bonds are paid. Such claimants have no specific lien upon the property.

2. PROMISES BY RECEIVER.—Promise of payment by the receiver does not change their case; they can only take the surplus after specific liens have been discharged.

A. W. Church, for defendant.

DRUMMOND, J.—This is an application by the petitioners Denniston and others, creditors of the Chicago, Alton & St. Louis Railroad, against the receiver, Mr. Robb, to be paid out of the funds in his hands as receiver.

The petition was filed on the 19th day of January, 1864, after decrees had been rendered in this court in November, 1859, and in August, 1862, which decrees purport to make, substantially, a final disposition of all the property of the railroad company, and which last decree ordered a sale. Out of that sale some of the funds were realized which the court has under its control. These petitioners claim that they had an equitable lien upon the moneys received from the earnings of the road.

One of the creditors claims that he recovered a judgment against the company in the Superior Court of this county,

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on the 7th of December, 1859, for \$747, for supplies furnished while the road was running under what is termed the Spencer lease. Another claims that he has a judgment against the company in the same court for \$842.62 for supplies furnished under the same circumstances. Another creditor alleges that the railroad company was indebted to him in the sum of about \$300 for supplies furnished, without particularly referring to the manner in which, or the time when, the supplies were furnished. Another creditor says he has obtained a judgment, without naming the court in which the judgment was obtained, for \$932.68, which judgment was rendered for iron spikes and other supplies furnished to the railroad company in 1858 or 1859.

The main ground of the application is that the road was leased to Hamilton Spencer, and the supplies were furnished to the road while it was run by him, and when the assignment was made by Spencer to Matteson and Litchfield, they agreed to pay the expenses which had been incurred in running the road by Spencer, and that when the road came into the hands of the receiver, under the decree of this court, these parties had an equitable lien upon the funds realized from the earnings of the road, out of which they were to be paid.

These petitioners have no specific lien, legal or equitable, upon this property. The fact that Spencer and Matteson and Litchfield agreed to pay them, did not create a specific lien. It may be conceded that, after the railroad came into the hands of Matteson and was run by him when the parties who had liens upon the road were paid, that other parties might have an equitable lien upon the earnings of the road; but certainly they would have no right to be paid until prior incumbrances and liens had been satisfied. The fact that Matteson and Litchfield received the personal property cannot make any difference. They received it with the conveyance of real property, and these parties could not follow that personal property, merely because Spencer or Matteson, or various

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other parties who may have had control of the company, owed them a debt.

It may be admitted that, if this road had remained in the hands of the receiver, and the parties for whose benefit he was appointed had been paid, then these petitioners might have been entitled to receive from the proceeds in the hands of the receiver any surplus; but what are the facts? Here were large mortgages upon this railroad which had become hopelessly insolvent. Application was made to the court to put it in the hands of a receiver, in order that it might be operated for the payment of these mortgages. It was so done. It remained in the hands of the receiver for some years. Subsequently, other creditors applied to the court, it being manifest that the mortgages could not be paid in that way, or, at any rate, that the time would be so long that it was desirable for the interests of all that the administration of the road should be changed. They asked the court to order the property to be sold so that the parties in interest might realize upon their claims. It was accordingly sold, and the fund arising from the sale came under the control of the court. Now what equitable lien had these petitioners on that fund? None. Why? Because those who had prior liens came in and swept it away, and more than that, have not, perhaps, been half paid. It is precisely like the case of a man who furnishes to the owner of a farm the means of carrying it on; but there is another party who has a lien upon that farm, and it is sold in order that the party who has the prior lien may be paid. Now the fact that the mechanic or laborer has furnished the means of carrying on the farm would not authorize him to come into a court of equity and cut off the prior lien which exists on the farm and prevent it from being paid. These parties ought to be paid. They have a just claim against this road. But it is against an insolvent corporation, and they ask parties who have a prior right and lien to pay them because those with whom they have dealt cannot do so.

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Upon general principles I hold what I have always held in all cases of this kind, that the party who has the prior lien is entitled to the preference, and this preference must prevail as against all except specific liens, and those, of course, have to be paid in their order.

The petition will, therefore, be dismissed

JAMES MURRAY vs. *ÆTNA* INSURANCE CO., OF
HARTFORD.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER,
1864.

1. **INSURER OF FREIGHT MONEY.**—A temporary retardation, and subsequent sale of the cargo by the owner, does not constitute an abandonment, nor deprive the carrier of his right to the freight money; he therefore, cannot recover from the insurer of the freight money.

2. **DUTY TO CARRY TO DESTINATION.**—Where a vessel takes a cargo late in the season, for transportation around the Lakes, and is laid up by stress of weather, it is her duty to complete the voyage in the spring, if practicable, and carry the cargo to its destination.

3. **FREIGHT MONEY—WHEN EARNED.**—If a cargo is necessarily unloaded at an intermediate point, and the owner sells it there, though the vessel might have carried it in the spring, the carrier has earned his freight.

Assumpsit for loss of freight money. The facts appear in the opinion.

Robert Rae, for plaintiff.

DRUMMOND, J.—I am of opinion as a matter of law that the plaintiff cannot recover in this case.

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The contract the defendant made was that the vessel should earn or be entitled to freight, and in the case of loss of freight or if the plaintiff was not entitled to receive freight in consequence of some accident or misfortune within the terms of the policy, then the defendant agreed to become responsible. The question is whether, according to the terms of the contract, the defendant is liable.

Fifteen thousand bushels of corn, in the fall of 1862, were shipped on board the schooner owned by plaintiff to be transported from Chicago to Kingston, and it was the freight list on this corn that was insured by defendant. A marine disaster happened to the vessel. She was dismasted and was towed into the port of Goderich, in Canada. The vessel lay there some time. The hatches were then taken off, and it was found that the corn was damaged more or less. Of course the schooner in the condition in which it then was could not proceed on her voyage without repairs. The corn was unloaded from the vessel, and placed in a warehouse, and the sound corn separated from the damaged corn. Shortly after it was so placed, it being in different stories of the warehouse, the warehouse broke down and the corn became again intermingled. There was a policy of insurance on the cargo by the Corn Exchange Company, and upon the receipt of intelligence of the disaster the agent of that company proceeded to Goderich with a view of determining what was to be done for the best interests of all concerned. The proof shows that about thirteen thousand bushels of the corn were in a sound condition when it was landed from the vessel, the remainder being more or less damaged. There is some conflict of evidence as to the manner and circumstances under which the corn was sold. The captain of the schooner claims that the corn was sold by the agent of the Corn Exchange Company. The latter, on the contrary, claims that the corn was sold by the captain. I do not think it is material which was the fact, but we will assume, what is undoubtedly true, that it was sold by the common consent of both. The plaintiff retained two thous-

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and two hundred dollars, and the balance of the proceeds was paid over to the agent of the Corn Exchange Company. It is immaterial what was the fact as to the manner in which this money was paid or received. Of course if it was paid and received as freight it could not again be recovered; but, according to the view the court takes, it is immaterial whether it was or not. It seems to be conceded that there was no material injury done to the hull of the schooner; that the chief injury was to the spars and rigging. We have to assume, of course, under the finding of the jury, that the vessel could not have been repaired in the port of Goderich that fall, and there is no dispute but it could have been repaired in the following spring or during the winter, and that the vessel would have been ready upon the opening of navigation to proceed on her voyage. The question is, whether, under the circumstances of the case, it was not the duty of the captain to go on and complete his contract, which was to transport the corn from Chicago to Kingston.

When a vessel takes a cargo, as in this case, in the fall of the year to transport to a distant point, it is one of the incidents of the navigation that owing to variable weather or freezing up, she may not be able to reach her port of destination. The mere fact that the vessel is not able to do so does not relieve the carrier from completing his contract and thus becoming entitled to his compensation. Neither here does the fact that the vessel was dismasted and was obliged to make a port of safety and the corn had to be unloaded, relieve the carrier from the duty of completing his contract, provided by proper repairs the vessel could have proceeded in the spring of 1863. The corn was in such a condition that it could have been transported in whole or part in specie, and could have reached the port of destination.

This being so, then it follows as a conclusion of law that if the owner of the corn chose to take it or have it sold he could not deprive the plaintiff of the right to the freight.

There is no controversy but that the vessel could have been

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repaired in the winter of 1862 or the spring of 1863. There can be none under the proof but that the corn could have been transported in specie, in whole or in part at least, to the port of Kingston, in the spring of 1863. Those facts being admitted, upon well-settled principles of law I think the plaintiff cannot recover.

Among the numerous authorities which have been referred to, I will only advert to three. The first is the case of *Anderson and another vs. Wallis*, reported in 2 Maule & Selwyn, 240. That was a case of insurance upon a cargo and in that respect was different from this. The ship sailed from London on the 16th of September, 1811, bound for Quebec. Having encountered heavy gales, so that she made a great deal of water, the master was obliged to return (having proceeded a considerable distance on the voyage) to the port of Kinsale, Ireland, and arrived there October 25th. On the arrival of the ship it was found necessary to make repairs upon the vessel before she could proceed on her voyage. These repairs were not completed until the 25th of March following. On examination it was ascertained that the cargo was damaged, and it was sold as a damaged cargo. Prior to this time the insured abandoned the cargo to the underwriter. The underwriter refused to accept the abandonment, so that the question arose whether there was a loss within the true construction of the policy. The court held there was not. Why? Because the goods were not lost, and because the vessel could have been repaired and could have proceeded on her voyage in the spring of 1812 to Quebec. The time that elapsed was from October 25 until March following, when the vessel should have so proceeded, and it was held—Lord Ellenborough delivering the opinion—that it was a mere retardation of the voyage. Now if in this case the cargo had been destroyed so that it lost its identity, and it did not in point of fact exist in specie, then, as a matter of course, it would have been a loss within the policy, and the court would have held that the insured was entitled to recover; but the cargo remaining

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in specie, although in a damaged state, the carrier having a right when the repairs were made to go on and complete the voyage, the property being sold as a damaged cargo, there was not a loss within the meaning of the policy.

The principle, although that was a case of insurance on the cargo and the case at bar is a policy on the freight, must necessarily be the same as to the question of loss. Here, as there, the agreement was to indemnify the plaintiff in case of loss—in one the loss of the cargo, in the other of freight—and in that case the court held that there was not a loss within the meaning of the policy, as we must hold here. The language of the court in that case has been cited with approbation in subsequent cases, and no court has ever yet decided that a temporary retardation is a total abandonment. Disappointment of arrival would be a new idea of abandonment in insurance law.

Here the question is, whether the loss of freight was in consequence of a peril of the sea or of the voluntary act of the master, and the answer is, It was the voluntary act of the master.

The next case to which I shall advert is the case of *Lordan vs. The Warren Insurance Company*, reported in 1 Story, 342. That was a case of a policy upon freight precisely like this.

The freight insured was a quantity of cotton, tobacco, and other articles of merchandise from New Orleans to Havre. The freight bill was nearly \$10,000. The vessel proceeded from New Orleans down the Mississippi and on her progress to the Gulf of Mexico on the 7th of June she met with an accident which rendered it necessary for the vessel to return to New Orleans for repairs. The vessel was fitted again for sea on the 21st day of July following, a little over a month. On examination it was ascertained that the cargo was injured, and it was taken out; a large portion of it was sold at public auction for the sum of nearly \$20,000. The residue, being in a sound state, was

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shipped for Havre in another vessel. Mr. Justice Story upon these facts says the ship was repaired and capable again of taking a part of the cargo at New Orleans within a reasonable time, and the master had a right to require that it should be so taken on board and carried on the voyage as soon as it might be in a condition to be safely re-shipped, and he had a right to wait until the cargo could be dried, sorted, re-packed and prepared for re-shipment; the delay arising thereby would be a mere retardation or temporary interruption or suspension of the voyage, and not an utter prostration or destruction [prostration is a bad word to be used in that connection I think]. If, then, the freight has been lost, it has been lost by his own voluntary act, and not by the necessary operation of any of the perils insured against. The whole testimony shows the cargo could have been dried, assorted and repacked for the voyage at the farthest within six months. It is true that the vessel was ready, so far as the repairs were concerned, within about six weeks; but he says the proof shows the cargo could have been ready in six months, and what was the consequence? That the party was entitled to his freight, and consequently the underwriter was not responsible as for a loss of freight. He proceeds: "Mere delay in the voyage or disappointment as to time never constitutes, as we have seen, any ground for the abandonment of the voyage."

The next case is *Hugg vs. Augusta Insurance and Banking Company*, 7 Howard, 595. That was also a case of insurance on freight like this. It went up on a certificate of difference of opinion between the judges below. The vessel in that case took a cargo of jerked beef at Montevideo to be transported to Matanzas or Havana. It was the freight on this cargo that was insured against. The vessel met with a disaster, and was obliged to put into the port of Nassau. Some of the cargo was thrown overboard, and another portion of it was found in so offensive and damaged condition that the authorities at once refused to have it landed. Another portion of it was sold, and the question in this case was, whether the under-

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writer was liable as for a loss of freight. Various questions were certified to the Supreme Court. Upon the first question the court held that if the jury found that the beef was a perishable article within the meaning of the policy, the defendant was not liable as for a total loss of the freight unless it appeared that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress, etc.

Admit that in the case at bar it was for the interest of the owner of the cargo or of all parties that it should be sold, still, if the vessel could have been repaired in the following spring, and have proceeded on her voyage from the port of Goderich, and could have transported the corn in specie to the port of Kingston, the plaintiff could not recover against the underwriter for a loss of the freight. The case last cited, and all the other cases, I think settle that.

As to whether it was a reasonable time or not. That question I think is also decided by the authorities and upon principle. Independent of authority the plaintiff cannot recover in this case, because if he could it would be substantailly holding that where there was a detention of a cargo shipped in the fall, in consequence of stress of weather, or frost or other causes, so that the cargo could not arrive at the port of destination till the following spring, there was a loss of freight, and that the insured should proceed at once against the underwriter for the freight. That would be an exceedingly dangerous doctrine to hold, so far as the commerce of the lakes is concerned. So that it resolves itself after all into, What was the reason there was a loss of freight, if there was such a loss? The only answer that can be given is, If there was a loss, it was in consequence of the voluntary act of the master, and not because of a peril of the sea; so that the verdict will have to be, as a matter of law, for defendant in this case.

See further that the master has a right to wait till the cargo is ready for forwarding, and in case of his failure so to do, the insurer is not liable. *Herbert vs. Hullatt*, 3 Johnson's cases, 93; *Griswold vs. N.Y. Ins. Co.*, 1 John-

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son, 205; *Saltus vs. Ocean Ins. Co.*, 14 Johnson, 138; *Clark vs. Massachusetts Fire and Marine Ins. Co.*, 2 Pickering, 104, M; *Gow vs. Ocean Ins. Co.*, 23 do., 405; *Lord vs. Neptune Ins. Co.*, 10 Gray, 109; *Mordy vs. James*, 4 Barnewall and Creswell, 394; *Tio vs. Vance*, 11 Louisiana, 199; *Adams vs. Haught*, 14 Texas, 243; *The Ship Nathaniel Hooper*, 3 Sumner, 542.

It seems to be universally held that the master has the power to forward the cargo in another vessel, if his own becomes unable to complete the voyage; but whether he is bound to do this, is unsettled in England, though American authorities hold the affirmative. See *Hugg vs. Augusta Ins. Co.*, *supra*; and a collection of cases in 1 Parsons on Shipping and Admiralty. 234, note 2; *Hugg vs. Baltimore and Cuba Smelting and Mining Co.*, 35 Maryland, 414.

For a full discussion of right of the master to deliver the cargo at an intermediate point, on payment of freight for the full passage, and of his obligation to so do on tender of the freight, see 1 Parsons on Shipping and Admiralty, 231, notes 2 and 3.

Where the insurer voluntarily accepts the damaged cargo at an intermediate point, the master is entitled to freight *pro rata itineris*. *The Mohawk*, 8 Wallace, 153.—[Reporter.]

UNITED STATES vs. JOSEPH SONACHALL.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—DECEMBER, 1864.

1. PERJURY.—Under the Act of March 3, 1863, the Secretary of War has authority to prescribe what facts shall be stated in affidavits by drafted men claiming exemption from military service; and false swearing in reference to facts so required is perjury.

2. NOTARY PUBLIC.—Is an officer authorized to administer oaths in such cases.

DEUMMOND, J.—I am inclined to think this indictment can be sustained, though the question is not free from difficulty, but as after trial the defendant can move in arrest of judgment, I am disposed to overrule the motion to quash.

It is an indictment against the defendant for having stated as a fact that which was untrue, in an affidavit made by him and presented to the board of enrollment for the Fifth Enrollment District, in pursuance, as is alleged, of the order of the board, under the regulations of the War Department. He asserted in an affidavit made before a notary public, with a view of obtaining an exemption from the military service of the United States, that he had never voted at any election in the United States.

I concede that under the law of March 3d, 1863,¹ the fact that he had voted at an election did not estop him from claiming exemption from the performance of military duty; in other words, if he were a foreigner, and had never declared on oath his intention to become a citizen in pursuance of the laws of the United States, he was exempt from military service, whether he had ever voted or not; but still the board

¹ 12 U. S. Statutes at Large, 73.

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of enrollment had a right to know, in pursuing the inquiry, whether he was a citizen or had ever made an oath of his intention to apply for citizenship, whether he had voted or not. The act already referred to in the 5th section provided for the appointment of a provost marshal. The 6th section declared that it should be the duty of the Provost Marshal General, with the approval of the Secretary of War, to make rules and regulations for the government of his subordinates. The 8th section provided that there should be in each district a board of enrollment, composed of a provost marshal as president, and two other persons to be appointed by the President of the United States. The 14th section provided that drafted persons should be carefully inspected by the Surgeon of the Board, who should truly report to the board the physical condition of all persons. The section proceeds to state: "Persons drafted and claiming exemption from military duty on account of disability or any other cause shall present their claims to be exempted to the board, whose decision shall be final."

The averment in the indictment is that this defendant, in order to comply with the requisition of the board, in pursuance of instructions from the War Department, and with a view of claiming his exemption from military service, made an affidavit before a notary public that he was a foreigner by birth and that he had never voted at any election, which last statement the indictment alleges to be untrue.

The 13th section of the act of March 3d, 1825,² declares that if any person in any case, matter, hearing or other proceeding where an oath or affirmation shall be required to be taken or administered under or by any law of the United States, shall upon the taking of such oath or affirmation knowingly and willfully swear or affirm falsely, every person so found shall be deemed guilty of perjury, etc.

The first question to be determined is whether this was an

²4 U. S. Statutes at Large, 118.

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oath under a law of the United States. I think this point is decided by the case of the *United States vs. Bailey*, in 9 Peters, 238. That case decides in effect that where the Secretary of the Treasury had authority to liquidate and pay certain claims to be presented to the Government, he had a right to prescribe that an affidavit should be made of the claims, and that where one was made in pursuance of the instructions thus given and there was an untrue statement in the affidavit, that the party might be indicted, although there was no statute of the United States which expressly authorized the officer before whom the affidavit was made to administer the oath in support of the claim, and although there was no law of the United States which expressly authorized the Secretary of the Treasury to prescribe the particular regulation referred to. It seems that the rule laid down by the Supreme Court in the case of *Bailey* substantially controls this case.

The act of 1863 authorized the Secretary of War to make these rules and regulations for the subordinates. The provost marshals and boards of enrollment were the subordinates. The indictment avers that he required affidavit to be made in relation to the particular fact, to wit: when a party claimed exemption on the ground that he was a foreigner, whether he had ever voted or not at an election. There can be no doubt under this act, if this case in 9 Peters is law, that the Secretary of War had the right to prescribe this form to the board, and that it was a material fact which had a right to know. The subject of investigation before the board was to be whether the party was entitled to exemption. If he was a foreigner, it was a pertinent inquiry whether he had ever voted at any election. It may be true that the fact that he had voted did not estop him from claiming the exemption; still, it was a proper inquiry before the board, and they had a right to know whether he had voted or not. I think the illustration given by the District Attorney was an appropriate one. If a party went before the board, claiming that he was exempt on the ground that he was a foreigner, they had a

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right to know where he was born. The Secretary had a right to prescribe that he should state under oath where he was born. If he knowingly stated a falsehood in relation to that, it was a matter material to the inquiry, although the fact that he was born in Great Britain, France, Greece, or elsewhere, would not be material as affecting his right to exemption. That is to say, he would be exempt whether he was born in one country or the other and had never made an oath of his intention to claim citizenship; but still the board had a right to know what the fact was, so far as it was within his knowledge. So in relation to many other facts which might be deemed pertinent to the question, Is this man exempt from military duty?

It will be observed that the act of 1825 does not in terms repeat the ordinary definition of perjury at common law, that it must be material to the point in issue, but the language of the act is, that if he shall "knowingly and willingly swear or affirm falsely" "in any case, matter, hearing or other proceeding when an oath or affirmation shall be required to be taken or administered," "he shall be deemed guilty of perjury."

The case referred to, decided by Judge Sprague, in one form went up to the Supreme Court of the United States; that is to say, after the party had been indicted in the district court he was indicted in the circuit court, and the case is reported in 17 Howard, 204. The principle decided by Judge Sprague was, that when the act of Congress declared that a certain form should be complied with, in order that the party should be entitled to the payment of money, that the Secretary of the Treasury had no right to enlarge that form, and go beyond its terms, and I have no disposition to object to his ruling upon that point. I am inclined to think that if a law of Congress does prescribe the form and manner in which a thing is to be done in order to accomplish a particular object, that neither President nor Secretary has any right to go beyond that form or manner. And if the act of 1863 had pre-

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scribed what facts should be stated to the board of enrollment by the party in order to exempt him from military duty, the Secretary of War would have had no right to enlarge that statement or go beyond it. It will be seen, therefore, that I hold that there was an affidavit made in pursuance of law, as it was made by the authority of the Secretary of War touching a question that was to come before the board of enrollment, in relation to which he was authorized to act, and that in prescribing that a foreigner, when he came before the Board and claimed exemption from the performance of military service, should state whether or not he had voted at any election in the United States, was a pertinent subject of inquiry, and, having sworn untruly upon that point, it was a false statement within the language of the act of 1825, and that an indictment will lie.

As to the other point, whether the officer had authority to administer the oath, I have no doubt whatever. This case of *Bailey*, already referred to, expressly decides that point in all substantial respects. There, there was no law of the United States, as the court has already stated, which authorized the oath to be taken before a justice of the peace—he was a state officer; but the oath having been taken before him, in pursuance of the regulations adopted by the Treasury Department, the court held that it was an oath under the law, and that an indictment could be founded upon it if the statement were false. Here the indictment alleges it to have been an oath taken before a notary public. He is a state officer. By the laws of the state and of the United States he has a right to administer an oath. The indictment alleges that he had authority to administer the oath, under the act of 1790. This is all that is required.

For these reasons I think the indictment must be sustained.

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**PATRICK BARLEY, ADMINISTRATOR, &c., vs. CHICAGO
& ALTON R. R. CO.**

**CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY,
1865.**

1. **TRACKS ON PUBLIC STREET.**—Where a railroad company is rightfully running its trains on a public street, it must do so in such a way as to be consistent with the safety of persons and property on the street.

2. **RATE OF SPEED.**—Irrespective of any city ordinance, the speed must be such as to permit the stoppage of the train within a reasonable time, and the train must be provided with all usual means and appliances for stopping.

3. **BACKING TRAINS—LOOK-OUT.**—When the engine is backing a train there should be a look-out to give notice of any persons or obstructions.

4. If there is steam or smoke upon the track great care and vigilance is required.

5. **MEASURE OF DAMAGES.**—In allowing damages for the killing of a child the jury cannot allow anything for the suffering or wounded feelings of the parents: they can only allow for actual pecuniary loss. If the family is poor, the fact that the boy would probably have early commenced to assist in supporting the family may be taken into consideration.

6. A recovery in a former action for medical attendance, expenses, loss of service and time before his death, does not affect the damages recoverable under the statute for death.

This was an action on the case under the statute by Patrick Barley, administrator of the estate of Benjamin Barley, deceased, to recover damages for the death of said Benjamin by the alleged negligence of the defendant.

The statute of Illinois is as follows:

§1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

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§2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next-of-kin of such deceased person, and shall be distributed to such widow and next-of-kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next-of-kin of such deceased person, not exceeding the sum of \$5,000: *provided*, that every such action shall be commenced within two years after the death of such person.¹

In March, 1863, a train of defendant, consisting of an engine and three freight cars, was proceeding north on Beach street in the city of Chicago, and the son of the plaintiff, a boy between seven and eight years of age, was standing upon the track, having a bag of shavings on his arm. The engine was pushing the cars, and was on the south end of the train, so that the first car struck the boy and he was crushed under the wheels and finally died.

A. W. Church, for defendant.

DRUMMOND, J., charged the jury as follows:

Under the statute in force in this state, the father, having taken out letters of administration, sues the defendant to recover damages for the loss which has been sustained, in the language of the statute, "by the next-of-kin" in consequence of the death of the child by the alleged negligence of the defendant.

The first question to be determined, therefore, is, Was it the negligence of defendant that caused his death?

Beach street was a public street and the defendant had a track laid on it. No law has been introduced on the subject, but it has been taken for granted that the defendant was rightfully on the street with its engine and cars. It being a public street, however, it is clear that it could be used by

¹ 1 Gross, 60; Revised Statutes of 1874, 582.

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the defendant only in such way as to be consistent with the safety of persons and property. While the defendant has a right to use the street, the citizens of the town, and of the country also, have a right to use it in passing over it with their persons and property. There was no particular portion of the street upon which the track of the road was to be laid. The railroad company simply had the right to use it for the purpose of trains which might be going over the road. The right of the user must be consistent with that of the public on the street.

Without undertaking to determine whether the ordinances of the city could prescribe the speed of the engine and cars so as to render it binding upon the public and upon the defendant,—as by declaring that a certain rate of speed was or was not negligence,—still it is clear that in running an engine and cars upon a street, it should be only with such speed as might enable the engineer, in case of obstruction by persons passing, to stop his train within a reasonable time. The train should be provided with the usual means and appliances to stop it; there should be a proper and sufficient look-out kept upon the train, and I think that would be, in such a case as this, a person watching where the danger was. The locomotive was at the rear end of the cars, they preceding the locomotive. I think there should be a person watching the track so as to enable the engineer to know when there was an obstruction upon it, so that the train could be stopped in a reasonable time, if it should be such as could not leave the track. To take an illustration: If a person on the train were to see any one walking along the track or crossing, there would be a reasonable presumption that that person would get out of the way of the train, but if there was a drunken man lying on the track, who would not be presumed to get out of the way, in such a case it is clear that the conduct of those having the management of the train ought to be entirely different from what it would be in the other case.

We are to take the facts as they are at the time, in order to

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prescribe the true rule of diligence on the subject; so if there was a little helpless child on the track, the conduct of those having the management of the train should be different,—there should be greater caution.

The evidence shows that the train was running from seven to eight miles an hour. It seems to be thought that is a reasonable speed, fast enough, at any rate in a populous city, over a frequented thoroughfare. It is as fast as a train ought to be permitted to go, as it seems to me. But it is for the jury to determine whether the train was running at an unusual or improper speed. If it was, then the defendant was guilty of a wrongful act.

So in relation to the look-out. Were those on the train watchful and careful in observing the track? One of the witnesses, who was sitting down upon the top of the car, says he was looking eastwardly—not where the train was going. Another says he was in another car looking north. Was he under such circumstances as to enable him to see, and did he see, what was on the track? If there was negligence in this respect, did it contribute to the accident?

Then, after it was ascertained that there was something upon the track, was there proper skill and diligence used in order to arrest the train as soon as possible, and if not, did that contribute to the result?

These are questions proper for you to determine under all the circumstances of the case.

It is said that there was steam and smoke which shut out the view of those on the train and prevented them from seeing the track as they otherwise would have done. The only remark that the court would make in reference to that is, that if it were so, it was incumbent on them to redouble their diligence and to run the train with greater caution. They ought to know, I think, when they are running upon our streets, where they are going. They ought to see, so far as the circumstances of the case will permit, what they are going to encounter.

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The next question is, was the boy himself guilty of any negligence which contributed in any substantial degree to the destruction of his own life?

There is a very embarrassing question in all cases of this kind. It is almost impossible for a court to lay down any fixed or permanent rule to guide you upon a subject such as this. The language of the law is, that the jury shall give such damages as have been sustained by the next-of-kin in dollars and cents by the destruction of the life of the person. It must be with reference to the pecuniary loss—I mean the loss which has been sustained in this case by the next-of-kin—that investigation is to be made and conclusion arrived at.

This was a boy of tender years. The pecuniary injury which was sustained must, of course, be with reference, almost exclusively, to prospective benefits which might have been derived by the continuance in life of the boy. At the time, he probably was rather a burden than a benefit pecuniarily to his family. The court has adverted to various illustrations during the progress of the cause, for the purpose of serving to some extent as guides to you in arriving at a correct conclusion upon the subject; for instance, as to what would be the pecuniary value of the services of a boy like this, taking his intelligence, his health, his chances of life, the amount which he could earn up to the time that he would arrive at the age of twenty-one years. The court refers to this, not as the only element in the case, but as a very important one, which may guide you. Of course this is, after all, a speculative view in relation to it. It is somewhat conjectural and must be in the mind of every man what may be the value of services of a boy like this. The difficulty in this case is that it is almost impossible for you to separate, as it is your bounden duty to do, the suffering and anguish which the friends have sustained, and the suffering which the victim has passed through, from the mere pecuniary consideration of the matter. You cannot allow anything for pain or mental anguish which these parties, or any of them, have

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sustained. You have nothing to do with that. It becomes simply a question of dollars and cents.

The family, it seems, is a poor family, living by the daily labors of the father. It is probable, in the natural course of things, that this boy, if he had lived, would have been employed by his father toward the support of the family, and it is proper for you to take all this into consideration. Taking into consideration all these various changes and chances of human life, health, sickness, and all these things, it is for you to say how much you think, as reasonable and intelligent men, on your consciences and on your oaths, has been the loss to these parties—the pecuniary loss—by the death of this boy.

As to the other action which was tried, I am of opinion that that does not prevent the plaintiff from recovering in this action. In that case the defendant strenuously resisted the right of plaintiff to recover anything beyond the loss of service for the child during his life and whatever expenses were incurred by the plaintiff, and for the loss of time, and so on; and the court sustained the view of the defendant, and confined the jury in damages to those elements. This action is not brought for the identical cause of action upon which the jury were permitted by the court to pass in that case. This action is brought to recover, as I have already said, the pecuniary loss which these parties have sustained by the death of the boy, and of course the court thinks that the result in that case does not prevent the plaintiff from recovering in this, and I hardly think that it can have any effect by way of diminishing the damages which might be recovered, because the damages in that case were confined to specific things, and the court must presume that the jury found damages in conformity with the instructions of the court. Those were, as appeared by the instructions of the court, for the loss of service of the child from the time of the injury until he died, for medical attendance, funeral expenses and the loss of time of plaintiff and wife, by reason of his accident, from the time of its occurrence until the commencement of the suit. It

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would not be proper for you to allow anything whatever for any of these things; you are not to take them into consideration at all. They have been allowed by a former jury. You cannot allow them a second time.

Verdict for plaintiff.

See further as to the great caution required of railroad companies in passing along streets, *Bellevue & Indiana R.R. Co. vs. Snyder*, 18 Ohio State, 399; *Chicago & Alton R. R. Co. vs. Gregory*, 58 Illinois, 226.

The law places no restriction upon the rate of speed at crossings; the company has the preference. *Warner vs. New York Central R. R. Co.*, 44 New York, 465. This was a country crossing.

"In crossing ordinary roads, caution and care are chiefly demanded to avoid running against or over anybody else; in crossing railroads, it is exacted to avoid being run over yourself. In the former case the blame attaches *prima facie* to the party doing the injury; in the latter it attaches, in the first instance, to the party obstructing the track." *Telfer vs. Northern R. R. Co.*, 80 New Jersey, 188.

And as to the company's duty in keeping a lookout, see *Bellevue & Indiana R. R. Co. vs. Snyder*, *supra*; *Bannon vs. Baltimore & Ohio R. R. Co.*, *supra*.

That the same circumstances will create different degrees of negligence and duty, see *Boland vs. Missouri R. R. Co.*, 36 Missouri, 484; *Chicago, Burlington & Quincy R. R. Co. vs. Dewey*, 26 Illinois, 255; *O'Mara vs. Hudson River R. R. Co.*, 38 New York, 445; *contra*, *Bannon vs. Baltimore & Ohio R. R. Co.*, 24 Maryland, 108.

For authorities as to computing damages, same as in the text, see *Telfer vs. Northern Railroad Co.*, *supra*; *City of Chicago vs. Major*, 18 Illinois, 349.

For an exhaustive collection of authorities on the rule of damages in actions of this kind, see Sedgwick on the Measure of Damages, 552, Note 2; see also *Brady vs. City of Chicago*, *post* p. 448.—[Reporter.]

Polk vs. Cosgrove.

EDWARD L. POLK vs. ALFRED COSGROVE.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—
JANUARY, 1865.

1. **RECORD OF DEED—WHAT CONSTITUTES.**—The filing a deed for record with the recorder of the proper county is, in Illinois, all that is required of the grantee, and his rights are not affected though the recorder fails to record it, or enter it in his minute book.

2. Notice to the plaintiff's attorney in attachment proceedings of an unrecorded deed of the land attached operates as notice to the plaintiff.

3. **NOTICE.**—But a clause in a deed from a stranger to the title is not notice to purchasers.

Ejectment for the one-third interest in the S. E. $\frac{1}{4}$ and N. W. $\frac{1}{4}$, Sec. 12, T. 39, N. R. 13 East, in Cook county, Illinois.

It was stipulated that Joseph M. Faulkner had title on the 20th of June, 1836, and the plaintiff claimed under a deed in attachment proceedings instituted by James Marsh against Faulkner, February 15, 1838. Judgment recovered May 23, and deed in due form by the sheriff to Marsh November 1, 1840. Marsh afterwards conveyed to plaintiff.

The defendant claimed that on the 13th of September, 1836, Faulkner made a deed to one Birdsall, and that this deed was duly filed for record. Defendant had a conveyance from Birdsall.

DRUMMOND, J., charged the jury as follows:

If Faulkner made a valid deed of the property to Mr. Birdsall on the 13th of September, 1836, and that deed was filed for record in the recorder's office of this county where the land lies, and prior to the issuing of that attachment, as a matter of course, the plaintiff cannot recover.

By the law in force at that time, every deed took effect from the time it was filed for record as against third parties purchasing from the grantor in good faith and without notice

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of such deed. Of course, as between the parties, a deed is always good, whether recorded or not.

The law at that time also rendered it the duty of the recorder, when a deed was filed for record to make a memorandum of it in a book which he was required to keep, mentioning the date, the parties, and the place where the lands were situated. He was also required to make an alphabetical index to each record book, showing the page on which each instrument is recorded, with the names of the parties thereto, and he was required to give a receipt to the person bringing such deed or writing to be recorded, bearing date on the same day as the entry and containing the abstract aforesaid.

The testimony would seem to leave no reasonable doubt of the filing of the deed were it not for the absence of the deed upon the record, and also of any memorandum of it in the entry-book which the recorder was required to keep, while there is an entry on the entry-book and a record of the deed from Birdsall to Pell, which Mr. Pell says he forwarded at the same time and by the same agent. There is something very singular about this, which, it is insisted on the part of the plaintiff, throws doubt upon the fact whether the deed was ever actually filed for record.

Of course it was not enough that the deed was left in the recorder's office or left *with* the recorder. It must have been filed for record—given and received for that purpose. But I feel bound to say, as a matter of law, that if, from all the evidence, you believe that the deed was thus filed, that was all that was required of the party; that if it was not recorded, or even if it was not entered on the entry-book, I think that third parties ought not to be prejudiced by the neglect of the recorder. That I understand to be the law of this state. It may be a difficult and embarrassing question, because the very object of the law was that there should be spread upon the record authentic evidence of the transmission of title, and if a deed is actually left in the recorder's office, filed and received for entry, and no entry of it is made in the entry-book,

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none can tell that there is any transfer of title to the land; but still that is something which the law throws upon the recorder.

But it is contended on the part of the defendant that, admitting the deed never was actually filed for record, still there was enough upon the records to inform every one that there was in existence a deed transferring the property from Faulkner to Birdsall, and to establish that, reliance is placed, first, upon the deed from Birdsall to Pell of November 22, 1836, recorded in 1837. This deed recites that Faulkner had conveyed the property to Birdsall on the 13th of September, 1836.

As a matter of law I think that recital does not bind anyone claiming from Faulkner or any of his creditors. It does not bind Marsh the plaintiff in the attachment suit, though the deed was actually recorded before the attachment was issued. He had no clue by which he could follow the title. He therefore was not bound to look into a conveyance made from Birdsall. Birdsall was a stranger to the title, so far as he could see. There was nothing upon the records to show that Birdsall had any title. All that he was bound to do was to trace the title from Faulkner on the public records of the county, and there being no title thus traced in the recorder's office from Faulkner, he was not bound to look into any possible deed which might be upon the records of the county in order to determine whether there was not a recital therein that Faulkner had divested himself of title. This would be unreasonable.

But it is insisted further on the part of the defendant that there was a mortgage from Birdsall to Faulkner foreclosed, and an assignment Nov. 23, 1836, of the mortgage by Faulkner to Grant & Bertel. The mortgage was dated September 13, 1836, the same date as the deed claimed to have been made by Faulkner to Birdsall. The bill was filed November 8th, 1837, interlocutory decree made March 10, 1838, and final decree of foreclosure (what is called strict foreclosure) in

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August, 1838. It will be seen that the bill was filed before the attachment was issued, although the decree was not made until after.

It is argued on the part of the defendant that as this bill showed that Faulkner had made a conveyance to Birdsall and had assigned it to the plaintiff in the bill of foreclosure, and that these facts were known to the attorneys who instituted the proceedings in attachment, that notice to them of this deed was notice to Marsh. It is to be observed that the suit was pending at the time that the attachment was issued; so that they had the care of this suit at the time the attachment was issued. It was not actually disposed of, but was in progress. The question is, whether notice to the attorneys was notice to Marsh, so as to destroy the attachment issued and levied upon this property. This is a very nice question, and one by no means free from difficulty. I can only give you my impression at this time. It is true that an attachment can issue against a non-resident, which, it is conceded, was the fact here, by filing an affidavit and complying with the various requirements of law, without specifically setting forth the particular property which it is claimed that the court should attach, and therefore it may be true in a given case that the attorney may not actually know upon what particular property the process will be served when he obtains it for his client, but still the object of the attorney and of the client is the seizure of the property, either by attachment or by what is called a garnishee process, which is a branch of the attachment, and it is presumable that the client of the attorney has in view some property upon which the process is to be served, either when the writ issues or before it is served. It is said the sheriff executes the process. Of course he does, but the presumption is that he executes it under instruction from the client or the attorney, and I am inclined to think that where the attorney knows that property has been transferred before the attachment is served, that knowledge must be considered as being brought home to his client, so that if the attor-

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neys in the foreclosure suit and in the attachment suit knew, as attorneys, that Faulkner had made a conveyance of this property in September, 1836, to Birdsall, when this attachment was issued and served, we must also suppose for the purpose of this case that Marsh knew it. They had not closed the litigation in which they were engaged for Grant & Bertel. It was still pending and undetermined, and while they were attorneys of these parties as to this very property an attachment was taken out by a third party and levied upon it. It is a little different from a case where the litigation had ended, and they had been employed in a new case where it may be supposed that the facts would have passed out of their mind.

The case was before them, not yet determined. But, notwithstanding Mr. Marsh might not have been a *bona fide* purchaser for value, still, anyone can protect himself, by either his own good faith, his want of notice and payment of value, or by claiming through any other person who has acquired the property in good faith, etc. The deed and mortgage not being notice to Marsh, no subsequent purchaser would be affected by the deed any more than Marsh, and no subsequent purchaser would be affected by notice to Marsh if he purchased in good faith, for value and without knowledge. Where it is claimed that a person is a subsequent purchaser, without notice and for value, the rule is that the party relying upon this fact must establish it, and by some proof independent of the mere deed.

Verdict for defendant.

Omission by the Register to index a conveyance does not prevent the conveyance being valid against subsequent purchasers. The index is no part of the record. *Bishop vs. Schneider*, 46 Missouri, 445.

But the noting of a deed for record by the officer, which is withdrawn by the person taking the beneficial interest under it, before being spread upon the record, gives it no priority. *Hickman vs. Perrin*, 6 Coldwell. (Tenn.), 185. Consult *Riggs vs. Boylan*, *post* p. 445.

That notice to an agent or solicitor of a person is notice to himself, see *Maurice vs. Byars*, 11 Georgia, 180.

As to the recitals in conveyances being notice to the public, see next case.—[Reporter.

JOSIAH M. MILLS *et al.* vs. NATHANIEL SMITH.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—

MAY, 1865.

EJECTMENT.

1. **BONA FIDE PURCHASER.**—A party can protect himself as a *bona fide* purchaser, either by showing payment by himself without notice, or that he took through some *bona fide* purchaser without notice.

2. **RECITAL IN RECORDED DEED—WHEN NOTICE.**—A recital in a recorded deed, the grantor in which had no record title to the property, does not operate as constructive notice; it is different where the party sees or has actual notice of such recital.

Action of ejectment for land in Cook county. The facts are stated in the charge.

J. H. Knowlton, for plaintiff.

DEUMMOND, J., charged the jury as follows:

The land in controversy was patented originally to Zeba Parmlee. The plaintiffs claim title by a deed from Zeba Parmlee to Edwin A. Lacey in February, 1837, which deed, however, has never been recorded. It is shown by the evidence that the land descended to Andrew H. Lacey as the heir of Edwin A. Lacey, and he devised the property to one of the plaintiffs, Flora M. Mills, wife of Josiah M. Mills. This is the title of the plaintiff, and, independent of all questions connected with the recording laws, of course it would be a valid title.

The defendant's title consists of a deed from Zeba Parmlee to James Lombard, dated the 14th of August, 1854, and recorded the 28th of that month and year, and a deed from James Lombard to defendant, dated December 7, 1855.

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The deed from Parmlee to Lacey not being recorded at the time that the deed was made by Parmlee to Lombard, the first question to be determined is, Was Lombard a purchaser protected by the recording laws?

They provide that every deed shall take effect from the time it is filed for record, as against subsequent purchasers without notice. This deed from Parmlee to Lacey not having been recorded in August, 1854, the first question to determine is, Was James Lombard, the grantee in this deed, a purchaser without notice of the previous conveyance made to E. A. Lacey, and did he pay for the land without knowledge of the existence of the previous transfer?

You will bear in mind that as Benjamin Lombard was the agent of James Lombard in the purchase, notice to Benjamin is notice to James Lombard, because notice to the agent is notice to the principal. It is necessary that Benjamin Lombard should have had notice of the previous conveyance, or of some fact which satisfied him that there had been a valid transfer of the land, or a valid incumbrance,—some fact sufficient to put a prudent man upon inquiry; in other words, there must have been good faith on his part when he made the purchase.

If he was a purchaser in good faith, then it makes no difference whether Smith was or not, because his purchase would protect Smith, the latter having purchased from him. But if he was not a purchaser in good faith, the next question is, Did Smith purchase in good faith? and the same rule is applicable substantially to him as to Benjamin Lombard, the agent of James Lombard. It is necessary that he should have purchased the land and paid the money for it without knowledge of this previous deed. If he knew of the existence of this deed, or had knowledge of any fact which would satisfy a prudent man or put him upon inquiry that there was a valid sale made to Edwin A. Lacey before he paid the purchase money, then he could not be considered a purchaser in good faith.

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But it is contended on the part of the plaintiff that as there was a deed from Zeba Parmlee to Andrew H. Lacey on record on the 25th of November, 1854, and as that recited that he had made a conveyance or transfer of the land to E. A. Lacey many years before, it was constructive notice to the defendant of the conveyance.

I am not prepared to admit that as a rule of law. If he had read this deed or the record of it, or had seen it,—if, in other words, he had actual notice,—then, of course, he would be bound by it; but I hardly think that the fact that it was simply on record, though he never saw it, would be constructive notice to him so as to prevent him from being a *bona fide* purchaser. At the time this deed was made Mr. Parmlee really had no title to the land, even upon the record, because the deed to James Lombard was recorded the 28th of August, 1854, before the deed was made to A. H. Lacey, and it would be a hard rule, it seems to me, to hold that a recital in a deed attempting to convey land which a man had no right to convey should operate as constructive notice to a third party. I do not understand any of the cases have gone thus far; therefore, the court will instruct you that it was necessary that Mr. Smith should have had actual notice of the previous deed, or of some fact which would satisfy a prudent man that there had been a transfer of the land, before he paid the purchase money, bearing in mind that the defendant can protect himself either by showing that Lombard is a *bona fide* purchaser without notice, or that he himself is a *bona fide* purchaser without notice.

Verdict for defendant.

The general rule is that a purchaser has constructive notice only of such facts relating to the land as appear in the muniments of title, which it is necessary for him to inspect, in order to ascertain the sufficiency of such title. 3 Washburn on Real Property, 596, and a large collection of authorities in note 4. As where a prior unrecorded mortgage is recited in a second mortgage, the grantee takes subject to same, *Baker vs. Mather*, 25 Michigan, 51. Consult also preceding case.—[Reporter.]

LAWRASSON RIGGS vs. PATRICK BOYLAN.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE,
1865.

1. **ADOPTION VALIDATES VOID DEED.**—A widow by re-acknowledging a deed executed by her while married, and therefore void, gives it full validity and force.

2. **RE-SIGNATURE NOT ESSENTIAL.**—It is not necessary that she re-sign the deed; it is sufficient that she acknowledge it to be her deed.

3. **FILING DEED FOR RECORD SUFFICIENT.**—When a deed is actually left with the recorder for record, the grantee has done all that the law requires, and his rights are protected, even though the recorder actually records only a portion of it.

Ejectment for land in Cook county. The facts are stated in the opinion.

DRUMMOND, J.—I shall decide this case entirely upon questions of law.

I think, under the conceded facts, that the plaintiff is entitled to recover his land. The legal questions involved are of interest and importance, and some of them, so far as my own knowledge extends, are comparatively new; some of them at least, have not been decided in our own state.

In 1825, Rebecca Clark, a married woman, was the owner of the land in controversy and conveyed it by deed to Elisha Riggs, she being then domiciled in Peoria. The deed was acknowledged in Pennsylvania, and recorded in Peoria county in 1827. It was supposed to have a defective acknowledgment. A copy was obtained from the recorder's office in Peoria, sent on to Philadelphia, and in 1839 Rebecca Clark acknowledged the instrument to be her act and deed for the purposes therein mentioned, before a proper officer, and he

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certified accordingly, she then being a widow. This copy of the deed was returned thus certified, and given to the recorder of Peoria county for record. This copy, and the certificate thus given to the recorder were not recorded entire by the recorder, but the recorder, considering that the original deed was upon the record, thought it unnecessary to re-record that, but simply added upon the record the certificates that were thus annexed to the deed, with a reference upon the record to the original deed of 1825. There is evidence tending to show that she re-signed the copy, but this does not seem to be clear, and I do not think it is material. It seems to me, taking the facts just as they are, without any explanation, and the certificate of the judge before whom the deed was acknowledged, that when she acknowledged at that time that to be her act and deed for the purposes therein mentioned, she gave it effect as a deed. That is the object of an acknowledgment to a deed.

It is said that, being a married woman at the time that she executed her deed in 1825, it was void. That is true, but this void deed, conceded to be such, was before her when the officer took the acknowledgment. She then acknowledged it to be her act and deed for the purposes therein mentioned, and the necessary legal conclusion from those facts, is that she intended then simply to acknowledge that the deed which was void should be certified in such a way that it should be deemed valid as evidence before the courts of the state, that the fair presumption from all the facts in the case is that she intended to give effect to it as her deed then; and that is the only construction I can give to the certificate of the officer, so that it was not material whether it was a void deed or merely voidable. She, admitting this, could give it effect then as a valid deed. This she did, according to the certificate of the officer; therefore, it was not material, according to the view which I take of it, whether she actually re-signed the deed or not. It is not necessary that a party should sign a deed in order to give it effect as his deed. Another party

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may sign his name, and if he adopts it and acknowledges it as his signature, it takes effect as his deed just as completely as though he had executed it himself. The only object of the signature is, of course, to show that the party does execute the deed and avow it as his instrument for the purpose stated.

The next question is as to the effect of the deed's being left thus with the recorder, and the recording of the certificate of acknowledgment upon the records of the office. Did that operate upon all parties as notice of the title?

Of course upon the face of the record the title was complete. They had to go outside of the record and show by independent evidence that Rebecca was a married woman at the time the deed was executed in 1825. Apparently the title was conveyed to Elisha Riggs. The duty of the recorder was to re-record the deed that was handed to him in 1839 with the added certificates, and I think that the deed having been given to him to be recorded and his duty being to record it, and he having recorded nothing but the certificates with a reference to the original, that the rights of the purchaser must be considered as having the shield of the law thrown upon them, and the deed did transfer the title.

I hold, therefore, that the deed of 1825, placed upon record in 1827, the certificates of acknowledgment being recorded in 1839, with a reference to the original deed, and filed for record with the recorder at that time, constitutes notice to all parties of whatever title there was upon the face of the paper, and as such that the purchaser under that title was protected by our recording law.

Judgment for plaintiff.

As to effect of recorder's not spreading on the records in full an instrument duly filed, see *Polk vs. Cosgrove*, ante p. 437, and notes to same.—[Reporter.]

Brady vs. City of Chicago.

BRADY, ADMINISTRATRIX, vs. CITY OF CHICAGO.**CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—****JUNE, 1865.**

1. **DUTY OF PEDESTRIAN.**—It is incumbent upon a pedestrian, crossing a swing bridge, to use reasonable care and caution, even though the city was negligent; and if he fails to do so, his administratrix cannot recover damages for his death.

2. **DAMAGES.**—Under the Illinois statute, only the amount of the actual pecuniary loss can be allowed; nothing can be added for grief or loss of society.

Action by Mary Brady, as widow and administratrix for pecuniary loss caused by the alleged wrongful act of the city of Chicago, occasioning the death of her husband, John Brady.

The following is the statute of Illinois, under which the action was brought:¹

§1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

§2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such

¹ Laws of 1853, Feb. 12, 1 Gross, 60.

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death to the wife and next of kin of such deceased person, not exceeding the sum of \$5,000,—*provided*, that every such action shall be commenced within two years after the death of such person.

DRUMMOND, J., charged the jury as follows:

It seems that on the evening of the 28th of November, 1864, the deceased, John Brady, with his fellow-laborer Peter Cole, after having finished their day's work on the South Side, in Chicago, were proceeding homeward to the north side of the river. They were on the east side of Clark street and on the east side of the bridge. The bridge was being opened. They stepped on the bridge, and that end of the bridge turned to the west, and it remained east and west for a vessel to pass, they remaining on the same side of the bridge. The bridge was then swung round to its position. Of course the north side of the bridge would first strike the abutment and enable a person on the bridge if he so chose, to get off from that side of the pivot bridge. Some conversation took place between Cole and Brady as to the actual condition of affairs at the time. It seems that Brady was anxious to proceed, and Cole stated to him that he had better not be in a hurry, or something like that, and referred to what was near being an accident to Brady on a former occasion. The night was dark, and the gas was not bright and did not shed much light upon that end of the bridge. Brady, it seems, was somewhat in advance of Cole, and as the east side of the north end of the bridge was swinging past what is called "the protection," running nearly parallel with the bridge, and some distance from it on the west side of the abutment, he sprang or stepped from the bridge on to this "protection," which consists of a series of piles driven at intervals, and fastened together by timbers, and planked over so as to constitute something like a walk, or what looks like one.

While doing this, he was spoken to by Cole, and in the act of turning round he lost his balance and fell into a boat lying in the river below, and injured himself so much that he died in a very short time. These seem to be the principal facts.

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The case proceeds upon the ground of negligence on the part of the city, and mainly, if not solely, because this protection, or planking on the protection, naturally has the appearance of a sidewalk, and it is insisted there should have been something there to prevent a person from stepping on it; and it is also claimed there was not sufficient light at the time to enable a person to judge between the protection and the actual sidewalk or pathway of the abutment to the bridge.

There must be negligence shown on the part of the city before the plaintiff can recover. It is contended by the counsel for the plaintiff that it was the duty of the city to have there the means to throw so much light upon the end of the bridge as to enable a person to see clearly where he was about to step as he passed from the moving part of the bridge on to the abutment or on to the protection. Not much controversy has been made upon this point by the counsel for the defense. Ordinances have been referred to which it is said make it the duty of the city to have the streets properly lighted. The testimony of Mr. Cole upon this point, seems to be strong to the effect that there was not sufficient light. He says that it was very dark, and that the protection looked like the sidewalk of the bridge. As I understood him, it was difficult to distinguish between them in consequence of the want of proper light. It seems, in point of fact, that subsequently, and perhaps in consequence of this accident, the city did place some reflectors there, which improved or increased the light. It is thus apparent that there was not as much light there as it was in the power of the city to produce.

As to the erection of a barrier upon the protection, I feel somewhat at a loss to give any instruction upon that point, because the witnesses have not been very fully interrogated about it, and there may be some reason for not placing it there which might not occur to us.

But it was the duty of the deceased, admitting that there was negligence on the part of the city authorities, to exercise reasonable care and caution, all things being considered as

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they existed at the time, and unless he did so the plaintiff cannot recover in this case.

The position of defendant is undoubtedly correct, that a different degree of care is requisite when it is dark or in the night-time from what ought to be exercised during the day.

It is proper to consider the warning which was given him, in order to determine the issue, not that he was necessarily careless, in consequence, but as one of the elements to enter into the case, and to show whether he acted prudently and with reasonable watchfulness and vigilance. Also, of course, we must take into consideration the fact that the bridge was moving. I have sometimes thought that it was a serious question whether foot-passengers ought to attempt to cross until the bridge ceased to move, but I give you no instruction on that point, leaving it as a matter of fact to be found by you.

If you shall find, under the instructions the court has given you, and under the facts, that the plaintiff may recover, then the next question would be, what damages the plaintiff would be entitled to.

This action is given by virtue of an express statute of the State. It could not be maintained at common law. The action is brought to recover for the pecuniary loss which has been sustained—nothing more or less; nothing for sorrow or grief which have been occasioned by the death of the person; nothing for the loss of society. The action is to be brought by the representative of the party for the benefit of the heirs and legal representatives. This woman was the wife of the deceased; is his administratrix, and she brings the action for the benefit of herself and her child, and if you shall think that she is entitled to recover, the question is, what pecuniary loss have they sustained in consequence of the death of the husband and father?

He was a painter by trade. He was a young man, about twenty five or six years of age. He was the only support of his wife and child. The damage, of course, in cases of this kind it is

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difficult to fix definitely. It is only by an approximation that we can arrive at the pecuniary loss which has been sustained. Although he was a young man, and a man of average constitution, his life was uncertain. He might die very soon, or he might live long. He might be sick or well. He might earn much or little. These things depend upon a thousand accidents and contingencies of human life and providence. All that we can do in relation to them, of course, is to use our own experience and our own observation, with such light as the evidence may reflect upon the subject, and approximate as nearly as we can to the pecuniary loss. It cannot exceed \$5,000, but of course it may be any amount less than that.

Verdict for plaintiff.

To maintain an action for negligence, there must be fault on the part of the defendant and no want of ordinary care on the part of the plaintiff. In proportion to the negligence of one party should be measured the degree of care required of the other. Where there are faults on both sides, the plaintiff may in some cases recover,—where his negligence is comparatively slight, and that of the defendant gross. *Galena & Chicago Union R. R. Co. vs. Jacobs*, 20 Illinois; 478; *Chicago, Burlington & Quincy R. R. vs. Devey*, 26 do., 255; *same vs. Hazzard, Id.*, 373; *Chicago & Alton R. R. vs. Pondrom*, 51 do., 333; *Chicago & Alton R. R. vs. Ho-garth*, 38 do., 370; *Chicago, Burlington & Quincy R. R. vs. Triplett, Id.*, 482; *same vs. Payne*, 49 do., 499; *Chicago & Northwestern R. R. vs. Harris*, 54 do., 528; *St. Louis, Alton & Terre Haute R. R. vs. Todd*, 36 do., 409. But see *Aurora Branch R. R. Co. vs. Grimes*, 13 Illinois, 535; *Dyer vs. Talcott*, 16 do., 300.

Negligence of the plaintiff will not bar a recovery for defendant's negligence, unless it directly contributed to the injury caused by defendant's negligence. *Short vs. Knapp*, 2 Daly, 150; *Thrings vs. Central Park Railroad Co.*, 7 Robertson, 616.

Therefore, where the plaintiff's negligence does contribute to the injury, he cannot recover. *Spooner vs. Brooklyn City R. R. Co.*, 36 Barbour, 217; *Owen vs. Hudson River R. R. Co.*, 2 Bosworth, 374; S. C. 35 New York, 516; *Burke vs. Broadway & Seventh Avenue R. R. Co.*, 49 Barbour, 529.

As to the rule of damages in this class of cases, see *Barley vs. Chicago & Alton R. R. Co.*, ante p. 430 and notes to that case.—[Reporter.

Hazard vs. Chicago, Burlington & Quincy R. R. Co.

E. W. HAZARD vs. CHICAGO, BURLINGTON AND
QUINCY R. R. CO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1865.

1. **RES JUDICATA—CHANGE OF FORUM.**—Where a suit commenced in the State Court has been carried to the Supreme Court, and a new trial ordered, the plaintiff has the right to dismiss his suit and commence in the Federal Court; the opinion of the Supreme Court does not constitute a bar unless it finally determines the suit.

2. But, on substantially the same state of facts, the plaintiff is bound by the *law* as laid down by the State Supreme Court: he cannot change the forum to obtain a different ruling.

3. **NEW EVIDENCE.**—The plaintiff has the right, however, to introduce evidence showing a new or different state of facts from those shown on the former trial.

DEUMMOND, J.—The question arises in this case upon the pleadings, but the main point has been argued irrespective of the form of the pleadings, and it has been submitted to the court by common consent, with a view of ascertaining our opinion upon what is supposed to be the real controversy in the cause, and therefore the opinion of the court will be given without regard to the particular form of the pleadings, which can be made in conformity with the view of the court, as was the understanding between the parties.

A suit was instituted in a state court by Mr. Hazard, the plaintiff, against the defendant, alleging that while upon a railway train of the defendant, by the carelessness and negligence of its agents he was injured, and for the injury the action was brought. The case was tried in the state circuit court and a verdict and judgment obtained for the plaintiff, and it was then taken to the Supreme Court of the state,

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which reversed the judgment of the court below.¹ When the case went back to the state circuit court it was dismissed by the plaintiff, and thereupon an action was brought in this court.

The declaration alleges substantially the same cause of action; that is to say, it is apparent that it was for the same damage for which the action was brought in the state court. It states that the injury was in consequence of the negligence of the agents of the defendant. Now, the defense set up here is that this judgment of the state court reversing the judgment of the court below is a bar to this suit, and that it cannot be maintained.

We are of the opinion that it is not technically a bar to the maintenance of the suit.

If the suit had gone on in the lower state court, it is clear that the plaintiff would have had a right to proceed with the trial of his cause—to have it submitted to a jury upon the evidence. The defendant could not have relied upon the opinion of the court above, unless the evidence in the cause was precisely the same in every substantial particular as it was on the former trial, as shown by the bill of exceptions, and we think that the plaintiff cannot be placed in a worse position here than he would have been in the state court, that he has a right to go on here with his cause and have it tried. But we think that the law as laid down by the Supreme Court of the state, ought to govern in this case although it is tried here, and that if it shall turn out that the facts are substantially the same, in every material respect, as they were in the state court, the defendant would have a right to ask this court to instruct the jury that the law is as laid down by the Supreme Court of the state. But it is possible the facts may be different. For instance, the main question is as to the negligence of the agents of the defendant. The evidence

¹ *Chicago, Burlington & Quincy R. R. vs. Hazard*, 26 Illinois, 373.

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might be different upon a second trial from what it was on the first trial.

We hold that the plaintiff cannot be excluded from introducing other and different facts from those which might have been established on the former trial, and which may give color one way or the other to the question of negligence.

This substantially disposes of the only question that has been argued and submitted to the court, and it expresses the opinion of both judges, and the counsel can adapt the pleadings to the views of the court in relation to the question of law. We understand that, upon the statement of the facts as they exist upon the record, the suit in the Supreme Court of the state does not constitute a bar technically to the maintenance of this action; for example, if it were alleged in the pleadings that this case was tried, and the whole bill of exceptions, the opinion of the court, and the whole record of the court, set forth in the plea, that does not constitute a bar to the maintenance of the suit, as it would not have constituted technically a bar to the continuation of the suit in the state court; that the plaintiff would have had a right to go on and try his case in the state court; that he has the same right here, but that this court will have to lay down the law as it was laid down by the Supreme Court of the state, if the facts are the same as they were there. Otherwise the effect would be this, that, after a party had chosen his own forum, and the opinion of the court was against him upon the law, he might dismiss his suit and go into an other forum and insist upon a different rule of law. We think as between a state court and the United States Court that rule ought not to apply, but that after a party has chosen his forum, and the opinion of the court, after a full investigation of the case upon the law and the facts of the case, is given, if he dismisses his suit there and comes into this forum, the law laid down by the highest tribunal of the state must govern him here, unless it is upon a question

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where this court is not bound by the adjudication of the Supreme Court of the state. •

Davis J., concurring.

An application for the removal of a cause from the State Court, after the State Supreme Court had remanded the cause to the court below, is in time. Such an order opens the case for further proceedings and for litigation as if no judgment had ever been entered *Akerly vs. Vilas*, Vol. 2 of this Series, 110.

By the acts authorizing a removal of the causes from the state to the federal courts, Congress did not intend to allow either party to obtain a practice or ruling more favorable to them, or when dissatisfied in the State Court, to obtain a trial *de novo*. *Akerly vs. Vilas*, Vol. 3 of this Series, 332; *Boggs vs. Willard*, *Id.*, 256; and see *Goodrich vs. The City*, 5 Wallace, 566.—[Reporter.

YOUNG ET AL. VS. CUSHING ET AL.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1865.

IN EQUITY.

1. This court will not make a decree the execution of which would affect the right of a party not before it, or throw a cloud upon his title.

2. If such absent party is a necessary party for a final decree, the bill should be dismissed without prejudice.

DRUMMOND, J.—The facts, so far as they are material to the decision of the questions in this case, are substantially these:

A man by the name of Adams was indebted to the plaintiffs in the sum of about \$1,800. Cushing, one of the defendants, was indebted to Adams in the sum of about \$1,600, and to

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secure a note given for the indebtedness Cushing had executed a mortgage or deed of trust on the property in controversy. The plaintiffs demanding some kind of security from Adams, he transferred to them as collateral security the note of Cushing to him, and the mortgage or deed of trust. The note was indorsed in blank. No assignment was made upon the mortgage or deed of trust. It was simply turned over to the agent of the plaintiffs. The mortgage or deed of trust of Cushing to Adams was upon the record and he appeared to be the owner of the property as mortgagee. Adams was financially involved, suits were pressing against him in this court, and among the judgments recovered was one in favor of one Edgerton. The note of Cushing to Adams not having been paid at maturity, Cushing transferred his equity of redemption to Adams.

Adams seems to have acted in bad faith toward the plaintiffs. He should not have taken the assignment of the equity of redemption, but it should have been made to the plaintiffs or to their agent for their benefit, but a deed of the equity of redemption of the interest of Cushing was, in fact, made to Adams, and the indebtedness of Cushing to Adams was considered as at an end. In other words, by the transfer of of the equity of redemption Cushing extinguished, or intended to extinguish, the note of \$1,600 which he owed to Adams, but which in fact was in the hands of the agent of plaintiff.

There would have been no trouble in this matter if there had not been rights of third parties intervening, as judgment creditors. This assignment of the equity of redemption was made by Cushing to Adams after a levy was made under the judgment of Edgerton, but before a sale of the property covered by the deed of trust or mortgage, as the property of Adams the mortgagee, and after the transfer of the equity of redemption Adams was, of course, upon the record, apparently the sole owner of all the interest.

Mr. Strain of La Salle, as the attorney of the plaintiffs, held the note and deed of trust of Cushing. They were not

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given up, however. After this, proceedings took place in a suit against Edgerton (he being of the opinion that the security which he had for the plaintiffs was gone in consequence of the non-recording of any assignment from Adams to the plaintiffs). Arrangements were made by which security was obtained for the indebtedness. A quarter section of land in the military tract was turned over to him, and consequently, when Adams could not make the payment of the note to the plaintiffs, a deed was made to one of the plaintiffs.

The question is, whether, upon this bill filed to foreclose substantially this mortgage or deed of trust on the part of the plaintiffs, obtained by virtue of this transfer to them or to their agent, the court can make a decree without the presence of Edgerton and without affecting his interest. Edgerton was originally made a party. Afterward the suit was dismissed as to him, and it is now sought to obtain a decree by which their rights may be enforced without affecting the rights of Edgerton.

It is claimed that Adams has refused to execute the trust. He held the property as a trustee of the assignee, and it is insisted that he should enforce the trust by sale of the property, and not being willing to do it, that he should be removed from the position and another appointed, and that the trustee be directed to go on and sell the property and to leave Edgerton with whatever legal or equitable rights he may have under his judgment and sale. If the court could do this upon principles of equity there would be no objection, but I do not think that it can be done.

It was not necessary to come into this court with this case. The party might have gone into the state court, and he might have brought in all the parties who are non-residents, and a decree have been rendered. Edgerton being a non-resident and there being no way by which we can bring him into court by publication, he not voluntarily appearing, of course we can make no decree affecting his interest which would be

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binding upon him. Neither can we properly make any decree in this court in which he is not a party which would affect his interests. If this court should go on and remove Mr. Adams, and appoint another trustee, and direct the property to be sold, and he should sell it and a deed should be made to the purchaser, would it not affect the interest of Mr. Edgerton? Certainly. It would, to say the least, throw a cloud upon his title, and raise a controversy at once in the mind of any one who was called upon to investigate his title as to where the title actually was. He holds by virtue of a purchase under the judgment and execution against Adams the mortgagee of the property. Now, by our law the rights of mortgagees can be sold as well as of mortgagors. On the record Adams was the owner as mortgagee of the property. The judgment creditors had a right to sell that interest, whatever it might be. It was sold and he became the purchaser. Now we cannot make any decree which will affect his interest without making him a party. He is not a party, and cannot, without service or appearance, be made a party in this court.

Therefore, the bill will have to be dismissed, but without prejudice.

Lombard vs. City of Chicago.

JOSIAH L. LOMBARD vs. CITY OF CHICAGO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—NOVEMBER, 1865.

1. DUTY OF CITY IN PROTECTING NARROW COURTS.—At excavations for admitting light at basement windows, in a narrow court, the city should require the owner to place guards as security against possible accidents; and it is negligence in the city to allow them to remain open.

2. DEGREE OF OBLIGATION—DUTY OF PEDESTRIAN.—The city, however, is not held to the same obligation as in a more public thoroughfare, and the passer-by must exercise due care, considering the character of the court and the purpose for which it was constructed.

3. CONTRIBUTORY NEGLIGENCE.—If the plaintiff did not exercise that degree of caution which a prudent man ought under all the circumstances to have exercised, he cannot recover, even though the city was guilty of negligence.

4. MEASURE OF DAMAGES.—The business occupation of the plaintiff is a proper element for consideration in computing the damages sustained by a personal injury; but the damages must be reasonable.

W. C. Goudy and *D. W. Hazzard*, for plaintiff.

D. D. Driscoll, for defendant.

DRUMMOND, J., charged the jury as follows:

A building had been constructed in Chicago on the corner of La Salle street and Couch alley. For the purpose of giving light to the basement, on the north side of the building, a small excavation had been made at each window, a few feet deep and a few feet wide. This had been left open for a long time. On the evening of the 9th of November, 1864, the plaintiff, in company with his brother, was proceeding through Couch Place when it was suggested by his brother that it was dark and muddy and that they had better turn back. In turning back, or immediately afterward, the plaintiff fell

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into one of these holes and suffered a very serious injury. The question is whether he is entitled to recover.

The city is sued on the ground that it has been guilty of negligence in allowing these holes or areas to be thus left open, and that is the first question to be determined,—Was the city guilty of negligence?

This is a mixed question of law and fact. It is conceded and proved that Couch Place was about twenty feet wide, and extended from Dearborn street to La Salle street; that the city exercised control over it as a public street. I do not think that it is material what we term it—whether Couch Place, or a street, or an alley. We know from the evidence what it is; that it is much narrower than the ordinary streets of the city, and that it is not, and cannot be, so much used as those streets; but, conceding that, it was subject to the control of the city, the city had exclusive care over it, and it was used for the passage of vehicles and of persons. It was then the duty of the city to have these holes properly guarded. The owner of the building constructed it by virtue of authority from the city, so far as he trenched on the alleys or streets, and it was the duty of the city to see that in the construction of the building there should nothing be done, and nothing so left, as in any considerable degree to impair the safety of the citizen; and it was the duty of the city to require on the part of the owner of this property that there should be some guards placed there as a security against possible accidents.

So that from what is conceded by the city, and what is proved beyond all doubt, the court is of opinion that the city has been guilty of negligence on its part in allowing these spaces to be left open in the way in which they were. The law does not require anything impracticable or impossible in relation to alleys or streets. All that it requires is that the city should do what it can, with the exercise of the powers given to it, to render the passage of vehicles and of pedestrians reasonably safe and secure, and it cannot be pretended in this case but that it was in the power of the city to have these

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holes secured. I therefore think that the city was guilty of negligence in thus permitting these holes to be left open. I understand that is conceded by the counsel for the city.

Still it does not follow, although the city has been guilty of negligence, that the plaintiff can recover. It is necessary that the plaintiff should not have been guilty of any negligence which contributed to the accident or the injury, in order to entitle him to recover,—on this principle: that, where two parties or persons are guilty of a wrongful act, one of them who has contributed by his own wrongful act to the injury shall not come into a court of justice to recover for the injury. The question is whether the plaintiff was himself guilty of any negligence which contributed to this injury.

The night was dark, or darkness was coming on at the time of the accident; the streets were muddy, and there was no light in the alley. The proof shows that the city has not been in the habit of placing lights in these narrow passages; at any rate, it had not placed public lamps in this passageway. I cannot say that if the accident happened in consequence of there being no lights in this alley, placed there by the city, the plaintiff is necessarily entitled to recover. I think he was bound to take the place as it existed at the time, as a narrow passage-way, made for the purpose for which it was constructed, and left open and in the condition in which it was at the time; and I understand that the counsel for the plaintiff substantially concede the truth of this proposition, that the same obligation did not rest on the city as to Couch Place as if it had been a more public street or thoroughfare.

It is difficult for us to precisely understand sometimes what is meant, when it is said that the plaintiff cannot recover in a court of justice if any negligence of his has contributed to the injury, where there is negligence on the part of the person against whom the action is brought; because it may be said, and is frequently said, that if the defendant had not been guilty of the negligence with which he stands charged the accident would not have happened. A man may go along a public

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street on the sidewalk in open day, and there may be an area left open for throwing in wood or for other purposes which may be lawful. It may be said that if the man should fall into that space he would not have fallen if it had not been left open, and yet it might be truly said in such a case, that in going along under the circumstances mentioned, he ought to keep his eyes open and ought to see where he is going, and if he should under such circumstances step into the area and sustain an injury, that he could not maintain an action. The meaning of it is simply this, that although the defendant may be guilty of negligence, still the plaintiff might be guilty of an act which a prudent man ought under the circumstances to have avoided.

The question so far as this point is concerned is this: Was the conduct of the plaintiff, under the circumstances of the case, that of a prudent man? Did he exercise that degree of caution which a prudent man ought to have exercised? In order to determine this, it is proper to take into consideration the condition of the alley, the fact that it was unlighted, and that he had means of reaching his point of destination by a public highway, a lighted street. If you shall believe that he did act as a prudent man, then, the city having been guilty of negligence, he is entitled to recover. If you shall believe that he did not exercise that care and caution which a prudent man ought to have exercised, then, although the defendant has been guilty of negligence, he cannot recover. This is a question of fact for you to determine under the directions and suggestions of the court.

If you shall believe under the evidence that the plaintiff is entitled to recover, the question is as to the amount of damages which you will award to him.

There is no dispute but that the plaintiff has sustained a very serious injury: the knee bone was broken, has never entirely reunited, and according to the testimony of medical gentlemen never will, and he will be lame for life or he will never have the use of the left leg in the same degree as he

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has of the right, so that it may be said that he has sustained a permanent injury. If I understand him rightly, however, this has not impaired his general health further than what arises in all cases of this kind from what may be supposed to be the loss of vital power which occurs in any case of permanent injury. It is proper for you to consider the nature of the injury and the pain that he has suffered, the time that he was confined and unable to attend to his ordinary business, and the amount he has expended to physicians, nurses, and others. All these are proper elements to be considered by you in coming to a conclusion as to what he is entitled to at your hands, if he is entitled to any compensation. The rule of law is compensation according to the measure which the law gives, which is in dollars and cents merely.

If the plaintiff at the time had been engaged in any particular business which in consequence of this injury he was prevented from pursuing, then I think it would be proper for the jury to take that fact into consideration. For example, take the case of a mechanic or a professional man. If he is prevented by the injury from following his ordinary avocation, be it mechanical or otherwise, then I think it is a proper consideration to be regarded in estimating the damages that ought to be given.

I will conclude what I have to say with one single remark. A party who comes into court under the circumstances of this plaintiff comes asking pecuniary compensation for the injury which he has sustained. In one sense, if we let our feelings take the reins, it might be truly said that no pecuniary compensation could ever be given for the loss of a limb or for a permanent bodily injury. There are some men whom no pecuniary temptation could induce to sustain such a loss,—perhaps the majority of men. We must deal with this matter in the light of reason and experience. We must look not only to the injury which one party has sustained, but to the ability of the other to respond for that injury. If you

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allow the idea to be entertained that no mere pecuniary compensation would be adequate for an injury of this kind, you will see at once that you might be led so far that individuals never could respond in damages for the verdict which might be rendered. The result would be that cases of this kind would be discouraged by the courts. We must, therefore, come to some reasonable conclusion in these cases, or else they cannot be permitted to stand. It is right and just that where a party has been guilty of negligence, and the other party who asks the compensation has been guilty of none which has contributed to the result, that the negligent party should respond in damages, but it should be reasonable damages. I make these remarks for the purpose of operating as a caution upon the jury. You must recollect that the court and jury sit together in these cases, and although it is a question of fact for the jury, still the facts are given to the jury under the direction of the court as to the law. The court always exercises a supervisory power, even over the finding of a jury upon the facts.

Verdict for plaintiff and damages assessed at \$4,000.

A person may use a usual city street crossing, though covered for a drain, if the inhabitants use it for a crossing, and if he is thereby injured from its unsafe condition, which the authorities were authorized to obviate but did not, the city is liable. *City of Champaign vs. Patterson*, 50 Illinois, 61.

A town having a traveled track sufficiently wide and suitable for all purposes of travel, and in repair, is not liable for injuries in consequence of a defective footpath in the highway fifteen or twenty feet from the traveled track, which the town had never worked or repaired, though the public foot travel had passed over it for thirty years. *Whitney vs Essex*, 38 Vermont, 270.

Cities and towns are under no obligations to light their streets. *Randall vs. Eastern R.R. Co.*, 106 Massachusetts, 276.

With reference to the question of contributory negligence, see *Brady vs. City of Chicago*, ante p. 448, and notes thereto.

Consult Law of Negligence, Wharton, § 973, and Shoauman & Redfield on Negligence, §§ 360, 383, 384, 415.

Consult also *Requa vs. The City of Rochester*, 45 New York, 129 —[*Reporter*.

Knowles vs. Pittsburgh, Ft. Wayne & Chicago R. R. Co.

LEVI KNOWLES AND J. EDWARDS ADDICKS vs. THE
PITTSBURGH, FT. WAYNE & CHICAGO R.R. CO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—
NOVEMBER, 1865.

The owner of property shipped over connecting railroads can, on failure to deliver, recover of an intermediate road into whose custody and exclusive control it had come

DRUMMOND, J.—On the 28th of December, 1863, C. H. Goodman & Co. shipped at Rockford, Ill., one hundred barrels of flour over the Galena & Chicago Union Railroad, consigned to Messrs. Levi Knowles & Co., Philadelphia, Pa., and a bill of lading was taken to that effect, showing also that the flour was to be taken by the way of the Pittsburgh, Fort Wayne & Chicago R. R. Co. The flour arrived in Chicago, where the car containing it was placed on the defendant's road. The proof shows that this was the usual way that the two roads prosecuted their business. The question is, who is the party that Knowles & Co. are to look to, the flour not having been delivered in Philadelphia; or rather, can they look to the defendant under the circumstances detailed in evidence here?

The fact seems to be that it was the usage of the defendant, when a car came upon its track, to examine the property and then to give a receipt, or a bill of lading; but the proof shows that as soon as it was on the road of defendant it was in the custody and exclusive control of the defendant. It seems to me that when this property was under the circumstances detailed, placed in the car on the track of defendant's road,—and it is conceded that they were the parties that took control of it and that had the right so to do,—

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that it was their business to take proper care of it, and to see that it was not delivered to any person except one who had a right to receive it. It was placed on their road for a particular purpose; *to wit.*, to be forwarded to Philadelphia. They admit that nobody else had any right to interfere with it. It strikes me that it was their business to see that the property was not diverted from the course to which it was destined.

It is not a matter of very much importance to the defendant, because somebody is responsible to it. It is simply a question whether these plaintiffs should look to this company or to the person who actually got possession of the flour. I think, under all the circumstances, the property being delivered on the railroad for a specific purpose, it being conceded to be the property of plaintiffs and that it was the defendant's business to take care of it, that the plaintiffs have a *prima facie* right to look to defendant for the fulfillment of its obligation, which was to transport the property to Philadelphia. This was one of the links in the chain of communication. It was put upon their road as a part of the transit. Now I do not see what difference there is in law or in fact from its being put in their warehouse. It was on their road. It was where they had exclusive control and management of it, and no one had a right to interfere.

It seems to me that, under such circumstances, the railroad within whose control and custody the property is, ought to be held responsible for it.

The jury found for the plaintiffs.

The rule as here laid down was afterwards re-stated in the case of *Josiah King vs. The Illinois Central R. R. Co.*, in this court; DAVIS, J., concurring. It is not considered necessary, however, to report that case.

Goods were delivered by A to B, who carried them to C, and there delivered them to D, to be carried to their destination. A recovered of D for their loss after showing that the goods had come to his possession, *Chicago & Northwestern R. R. vs. Williams*, 44 Illinois, 176; *Wing vs. New York & Erie R. R.*, 1 Hilton, 235; *Michaels vs. New York Central R. R.*, 30 New York 564; *Cooper vs. Milwaukee & Chicago R. R.*, 31 Wisconsin, 619. See also *Bissell vs. Price*, 16 Illinois, 408, where an action by an interme-

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diate carrier for advances and freight was sustained, the injury having been done by a previous carrier, to whom the defendant was referred by the Court for his redress, or else on his original contract with the first carrier.

The rule in Illinois is now settled that the first receiving carrier is *prime facie* liable for any loss or injury to the goods until they reach their destination, even if that is beyond its route. *Illinois Central R. R. vs. Frankenburg*, 54 Illinois, 88; see also *Muschamp vs. Lancaster & Pennsylvania R. R.*, 8 Messon & Welsby, 421; *Watson vs. Ambergate Railway*, 8 English Law and Equity, 497; *Scothorn vs. Staffordshire Railway*, 8 Exchequer, 341; *Wilson vs. New York Railway*, 18 English Law and Equity, 557; *Crouch vs. London & Northwestern Railway*, 25 do., 287; *Bristol & Exeter Railway vs. Rolins*, 7 House of Lords Cases, 194.

Contra, that the carrier is liable to end of his own route only. *Railroad Co. vs. Manufacturing Co.*, 16 Wallace, 318; *Skinner vs. Hall*, 60 Maine, 477; *Root vs. Great Western R. R.* 45 New York, 525; approved in *Babcock vs. Lake Shore & Michigan Southern Railway Co.*, 49 do., 495; *Van Santwood vs. St. John*, 6 Hill, 158; *Jameson vs. Chicago & Alton Railway*, 4, American Law Register, 284, note; Redfield on Carriers, §181, and cases cited in note 9. Consult also *Woodward vs. Illinois Central R. R.*, Vol. 1 of this Series, 403, 447, and cases collected in note to same.

And, where goods have passed several carriers, on delivery at their destination in a damaged condition, it will be presumed, in absence of direct evidence, that the damage was caused by the last carrier. *Laughlin vs. Chicago & Milwaukee R. R.*, 28 Wisconsin, 204.—[Reporter.]

Hopcock vs. Wicker.

S. HOPPOCK vs. JOEL C. WICKER.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH,
1866.

1. Where A held a claim against B and C, a promise by B to A that if he, A, would sue C, obtain judgment and levy on his property, he, B, would bid the amount of the claim, is a valid consideration upon which an action will lie by A against B for refusing so to bid.

2. CLAIM NEED NOT BE A VALID ONE.—It is not necessary that the claim be a legal or valid claim against B. It is sufficient that he desired it to be prosecuted against C, and not against himself.

3. MEASURE OF DAMAGES.—*It seems*: that full damages could not be recovered unless the debt was lost in consequence of such failure to bid, or it appeared that C did not have other property from which the judgment could be made.

Demurrer to declaration. The facts are stated in the opinion.

McCagg & Fuller, for plaintiff.

Chas. H. Reed, for defendant.

DRUMMOND, J.—The substantial ground of the action in this case is, that the plaintiff had a claim consisting of a debt or demand, as alleged in the declaration, against J. P. Chapin & Co., and against the defendant, for the rent of divers lots of land in the county of Fulton, which claim amounted to sixteen or seventeen hundred dollars, and that the defendant promised the plaintiff that if he would bring suit or suits against J. P. Chapin & Co., and obtain a judgment against them, and offer for sale certain property, that he would bid for that property the amount of the claim; and the declaration further avers that he promised to pay the

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taxes on the property and the premium for the renewal of two policies of insurance which were then held; and that the plaintiff, relying upon this promise of the defendant, commenced suits against J. P. Chapin & Co. for this claim, and recovered judgment against them for the amount; that execution was taken out and levied upon the property, and that it was offered for sale and defendant was notified and had due notice of all these facts, and was requested to comply with his promise and undertaking, by bidding the amount of the judgment or claim; that he failed to do this, by which the plaintiff has sustained damage. This is substantially the ground of the action set forth in the declaration.

Objection is taken that it is not a good and valid consideration upon which a promise was binding.

I am inclined to think that it is. The allegation is that there was a claim against defendant and Ohapin & Co., and in consequence of there being this claim, and if the plaintiff would prosecute it to judgment, that the defendant would come in and make these bids. It is unnecessary that the declaration should allege that it was a valid or legal claim against the defendant. It is sufficient that there was a claim against him and others, and that he apparently desired this claim to be prosecuted against the others, and not against him, and certain property to be levied upon, and if it was, he promised to make the bid. It is an unusual case, I admit, but I am inclined to think that the consideration is sufficient to support the promise of the defendant.

The first and second counts of the declaration allege substantially the contract as I have stated it. The demurrer would apply most strongly against these two counts. The third and fourth counts set forth with more particularity the circumstances attending the promise and the reason why the arrangement was made between the parties, and of course the demurrer would be less available to these counts than to the first and second, but I think that all the counts are substantially good.

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It may be a question whether the plaintiff can recover all the damages which he sets forth. That I cannot decide upon the demurrer. That would come up more in the form of an instruction to the jury as to the measure of damages in the particular case. There is no allegation that the debt was lost in consequence of the defendant not bidding the amount of the judgment. There is no allegation negating the fact that the plaintiff could levy upon other property and thus realize the judgment which he had recovered against J. P. Chapin & Co. The only allegation is that the defendant made this promise, if the plaintiff would do certain things. Plaintiff has done them, and he has not complied with his promise. Now, it is clear that the plaintiff has been damnified in consequence of the defendant's neglect to keep his promise. To what extent, is another matter. It is sufficient that he has been damnified, that in consequence of the promise of the defendant, he has prosecuted these suits, has been obliged to employ counsel, and has himself been subject to more or less labor, expense and trouble. This is sufficient to show that the plaintiff is entitled to maintain this action. It would come up as an after consideration whether the plaintiff was damnified to the extent which is claimed in the declaration or which the court is asked to infer from the nature of the declaration. That point I do not feel inclined to decide now.

Demurrer overruled and leave to plead.

On trial before a jury verdict and judgment was rendered for plaintiff for the full amount claimed, which judgment and the charge of the court to the jury were, on writ of error, sustained by the Supreme Court. *Wicker vs. Hoppock*, 6 Wallace, 94.—[Reporter.]

Collins vs. City of Chicago.

AARON L. COLLINS vs. THE CITY OF CHICAGO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY,
1867.

STATE TAXATION OF NATIONAL BANKS.

1. The capital stock of a national bank cannot be assessed, as such, by state authority.
2. The only way such stock can be reached is by assessment of the shares of the different stock-holders.

DRUMMOND, J.—The material facts in this case are that the city caused to be assessed, for the payment of taxes, under the law of Illinois, the stock of the First National Bank of this city, as so much capital in the aggregate, with the intention of having the tax levied on the sum total of the capital stock of the bank. Plaintiff, a non-resident stock-holder, has applied to have the assessment set aside as illegal.

The assessment is in violation of the acts of Congress authorizing the existence of national banks. The capital stock of the bank, as such, cannot be assessed under state authority. The only way that such stock can be reached is to assess the shares of the different stock-holders in the same manner that assessments are made in other cases against property owned by the citizens and inhabitants of the state.

For a full discussion of the right of states to assess corporations and corporate stock, consult *Union National Bank vs. City of Chicago*, Vol. 3 of this Series, 82, and cases there cited; *State Tax on Foreign-held Bonds*, 15 Wallace, 300; *The Delaware Railroad Tax*, 18 Wallace, 206.

It was held by the Supreme Court of Illinois in *People vs. Bradley et al.*, 39 Illinois, 130, that where the state taxes the *capital*, and *not* the shares of stock, in state banks, it can also tax the *shares* of national bank stock. The New York Court of Appeals held the same doctrine in *Van Allen vs.*

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Nolan, Supervisor, &c., 33 New York, 161. These cases were both reversed by the United States Supreme Court, on the ground that the state can only impose a tax upon the shares of national bank stock where it taxes the shares and not the capital of a state bank in the aggregate. *Bradley vs. The People*, 4 Wallace, 459; *Van Allen vs. The Assessors*, 3 do., 578.

See also *Teppan, Collector, &c., of Chicago, vs. Merchants' National Bank*, 6 Legal News, 253, October Term, 1873.—[Reporter.

HENRY BRADLEY vs. WILLIAM LILL.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH,
1861.

1. NOTE PAYABLE IN EXCHANGE.—The fact that a note is made payable in exchange does not prevent its being a promissory note, even though the rate of exchange is not specified.

2. COMPUTATION OF EXCHANGE.—The exchange, like interest, is an incident to the principal sum, and the rate is subject to proof; but when the proof is in, then the amount is a matter of computation.

3. AUTHORITY OF STATE DECISIONS.—On a commercial question this court is not bound to follow the decisions of the State Supreme Court, especially when contrary to the opinion of the mercantile community and the general opinion of the profession. *Case of Lowe vs. Bliss*, 24 Illinois, 168, disapproved.

4. The Illinois Statute of February 12, 1857, does not apply to a contract where no rate of interest is fixed by agreement.

This was an action upon the following promissory note :

\$2,583 51.

CHICAGO, ILL., Sept. 30th, 1859.

One year after date, I promise to pay to the order of myself, two thousand five hundred and eighty-three dollars and fifty-one cents in exchange at the office of Messrs. Ashley & Norris, No. 59 Exchange Place, New York. Value received.

(Signed) WILLIAM LILL.

(Indorsed) William Lill.

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The objection was taken that, being a note made in Illinois, although payable in New York, the note was governed by the Act of the Legislature of this state of Feb. 12, 1857, though the note did not on its face bear interest. It was also objected that the exchange was an uncertain and indefinite sum, and that a recent decision of the Supreme Court of this state, *Lowe vs. Bliss et al.*, 24 Illinois, 168, rendered it inoperative as a note.

The statute referred to is as follows :

Where any contract or loan shall be made in this state, or between citizens of this state and any other state or country, bearing interest at any rate which was or shall be lawful according to any law of the state of Illinois, it shall and may be lawful to make the amount of principal and interest of such contract or loan payable in any other state or territory of the United States, or in the city of London, in England, and in all such cases such contract or loan shall be deemed and considered as governed by the laws of the State of Illinois, and shall not be affected by the laws of the state or country where the same shall be made payable.¹

Davenport & Wilder, for plaintiff.

Scates, McAllister & Jewett, for defendant.

DRUMMOND, J.—The statute of Feb. 12th, 1857, does not apply to this case, because that contemplates a case where there was an amount of interest fixed by the agreement of the parties, in which event, if the rate was legal according to the laws of Illinois, the contract might be enforced, notwithstanding the money was made payable in another state or country, and the rate of interest greater than there allowed.

This court has always held that the fact that a note is made payable in exchange, does not prevent its being a promissory note, and with all due respect to the Supreme Court of this state, I cannot concur in the opinion expressed in the case of *Lowe vs. Bliss*, recently decided. 24 Illinois, 168.

¹ 1 Gross' Statutes, Chap. 54, § 13; R. S., 1874, p. 615, § 9.

An instrument of writing by which A, at Chicago, promised to pay to B within a certain time one thousand dollars with the current rate of exchange on New York at maturity, is a promissory note, notwithstanding the rate of exchange was not specified. I admit that under the general law a note must be payable absolutely, in money. In the example given a thousand dollars was the sum payable; the exchange, like interest was an *incident* merely to the principal sum, and it was not the less on that account an agreement to pay a fixed sum. If a note be executed in England, payable "with interest" and a suit be brought on it here, the amount of the verdict or judgment is not a mere matter of computation, but proof must be introduced of the rate of interest in England, and the amount of the verdict or judgment, even after the proof is made, is greater or less, depending upon the fact whether the verdict is rendered to-day, next week or next year, the amount of interest increasing regularly by efflux of time; but when the proof is in, and the time established, then the amount becomes a matter of computation. So, when the proof as to exchange is in, and the time fixed, then also the amount is a matter of computation. In the one case the principal amount and the time and rate fixed by evidence, control and determine the aggregate sum, and equally so in the other. If this suit were brought in the courts of this state, being a note payable in New York, the amount for which judgment would be rendered would have been ascertained, not from the face of the note itself, but by evidence before the court or jury of the law of New York as to interest. It would be only when that was done that the amount could become a matter of computation.

This court, therefore, till overruled by the Supreme Court of the United States, adheres to the view that it has always taken of this point, that an instrument of this kind is a promissory note. This is a commercial question, and this court is not bound to follow a decision of the Supreme Court of this state on this branch of the law; the more especially

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when it is contrary to the opinion of the whole mercantile community, as shown by uniform practice, and contrary also to the general opinion of the profession.

Demurrer overruled.

The decision in the case of *Low vs. Bliss*, above referred to, was made by a divided court, and with reference to the statute of Illinois concerning negotiable paper, and was afterward commented upon in the case of *Bilbert vs. Burlingame*, 37 Illinois, 338, in which case it was further held, that an instrument admitting a certain sum to be due, which may be paid in merchandise in a fixed price, becomes an absolute money demand, on failure of the payee to deliver the merchandise when it is called for.

A note expressed to be payable with current rate of exchange, at the place where it is drawn and is to be discharged, is payable in coin, and there is no rate of exchange connected with it. The words, "with current rate of exchange," in such a note, are without significance. *Hill vs. Todd*, 29 Illinois, 101; *Clauser vs. Stone*, *Ibid.*, 114.

Where the note provides "the current rate of exchange to be added," it is not a valid promissory note, even for the principal amount in the note. *Philadelphia Bank vs. Newbirk*, 8 Miles (Penn.), 442.—[Reporter.

GERRIT SMITH vs. TRIBUNE COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1867.

PLEADING ON LIBEL.

1. **JUSTIFICATION.**—A plea of justification must be as broad as the libel, and answer every material part of the declaration.

2. **MATERIALITY OF ALLEGATION.**—An allegation that the plaintiff, in order to avoid arrest for participation in an offense, feigned insanity, and took refuge in a lunatic asylum, is a material part of the libel.

3. **SEPERATE PLEAS TO SEVERAL ALLEGATIONS.**—It is not necessary that one particular plea answer the whole libel, if the whole is answered by the different pleas. The defendant may justify separately and distinctly, but in such case the pleas should purport to answer only the particular charges.

4. **NEWSPAPER PRIVILEGE.**—It is not a good plea that the plaintiff was a public man, a lecturer and speaker, and professed to be an educator of the public, and that the defendant, a public journal, made the publication complained of with good intent, having reason to believe it to be true; a journal has no right to make specific charges against a man, unless they were actually true, and honesty of motive is not a sufficient defense.

5. A demurrer to a count must take the innuendoes as alleged.

6. Plea of not guilty puts in issue the question whether the proof supports the innuendoes.

Farwell & Smith, for plaintiff.

Wirt Dexter and John Van Arman, for defendant.

DRUMMOND, J.—The declaration contains various counts, among others one referring, by proper innuendoes, to the raid of John Brown into Virginia, the offense that he committed there, and his arrest, trial and execution for the offense; and the statement in these counts is that the libel which is referred to and set forth in them intended to convey

the idea that the plaintiff was an accomplice of Brown, that he aided and assisted him, and that in order to avoid an arrest for his participation in the offense of Brown he feigned insanity, fled and took refuge in a lunatic asylum.

The pleas are, in the first place, the general issue, and secondly several short pleas which purport to answer the whole declaration, and aver that the plaintiff did aid and assist John Brown in Virginia, and that he did take refuge in a lunatic asylum. There is another long plea of justification, setting forth in various forms the acts and doings of the plaintiff as a public man, which plea also purports to be a plea to the whole declaration.

The main question raised by the demurrer to these pleas is this: Is the statement in the declaration that after having participated in this act of John Brown, the plaintiff, in order to avoid the consequences of it, feigned insanity, a material part of the declaration and one which it is necessary for defendant to meet and answer?—because, confessedly, this part of the declaration is not answered by these special pleas. The plea of general issue of course answers it, but these special pleas do not purport to answer that part of the declaration.

The rule in such cases is that the plea of justification must be as broad as the libel. It must answer, in other words, the whole libellous matter, else of course it is not a good defense, and while it is true that it is not necessary that the plea should answer an immaterial portion of the publication, still it must answer every material part.

The question therefore is, Is this a material part of the libel? I think it is, and I think that it should be answered in order that the plea should be good, otherwise there is a libel which is only answered in part, and at the same time the plea purports to be an answer to the whole.

Several illustrations were given in the course of the argument to the effect that if the plea did answer the libel that a mere incident in the libel need not be answered—that it was sufficient to answer the principal charge; that that being an

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swered, as a matter of course the incident or appurtenant to the principal charge was answered. That is true. The only question is whether you can apply it to this case and call this charge a mere incident to the principal charge. It was said that the principal charge was the participation in John Brown's raid, in his criminal enterprise, and that the other was a simple incident. If it were so, then of course the plea would be good, but the view that we took of it before, and still hold, is that it was not a mere incident; that it was a substantial, direct libel in itself to charge that a man had participated in a wrongful act, or any act, and that for the purpose of avoiding the consequences to himself from that act he feigned insanity.

It is not necessary that one particular plea should answer the whole of the libel, provided that the whole libel be answered as a defense; for example, if there is a plea of the general issue to the whole declaration, that of course constitutes a defense. Then there may be other pleas answering various parts of the libel when it consists of different parts, but in such cases the plea should only purport to answer those parts, and it would be a good plea, of course, in answer to that part; so that if the libel consists of the allegation, in the first place, that the plaintiff participated in the criminal enterprise of John Brown, and in the second place that in order to avoid the consequences of that criminal act he feigned insanity, the pleader can answer the first, leaving the rest unanswered. The only question then would be whether there was anything left to answer. If there was, as a matter of course the parties would have to go to trial on that portion of the libel which was answered, and on the rest, as in this case, on the general issue.

If this were a case of libel consisting of substantive and distinct charges, and one of them alone was answered, the rule would be apparent that in such a case the plaintiff would have a right to take a default as to the other portion and have his damages assessed as to the portion that remained unan-

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swered, but that would not prevent the party from answering such portions as he could answer, and if he answered those successfully, there could be no damages as to them.

This, I take it, must be the rule. While it is true that the justification must be as broad as the libel, still you are not prevented from justifying separately and distinctly. The only effect of it would be that that portion you do not justify remains undefended as to that particular plea.

For this reason I think that the demurrer to these pleas must be sustained.

The last plea, which is called the plea of privilege, is substantially this: that the defendant justifies the libel or publication on this ground; that the plaintiff was a public man; that he professed to be a teacher and educator of the public; that he had been in the habit of delivering speeches and lectures from time to time, and made various publications under his own name and of which he was the recognized author, and that the defendants are the conductors and publishers of a public journal, and that they, in the exercise of a proper, fair and just spirit of criticism, made the publication complained of with good intent, having reason to believe that the statements therein contained were true.

I do not think that this is a good defense. The declaration proceeds upon the ground of distinct and separate charges being made by the defendant against the plaintiff of his having participated in the crime, or that which was recognized as such by the laws of the country, and of his having, in order to avoid the consequences of that criminal act on his part, feigned insanity.

It is not an answer to that to say that he is a public man; that he affects to be an educator of the youth of the nation, and that the defendants are the publishers of a newspaper, and that they can criticise his acts in the way that the declaration alleges that they did. Undoubtedly they can criticise his acts. They can hold him up to ridicule so far as they are justified in doing so by his public acts, by anything that he has

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done or said, but they have no right in doing so to make a distinct charge against him that he has committed a crime, and that, in order to avoid the consequences of it, he has feigned insanity. That would be allowing the license of a public journalist to go further, I think, than any adjudicated case would warrant. We all desire the entire freedom of the press, but it has never been understood as authorizing the bringing of charges against a man of his having committed a crime, unless those charges were true.

Now there is nothing in this plea to indicate that these charges were true, but only that they had reason to believe that there was something in them, and that they were made in good faith and for honest purposes by them as the conductors of a public journal. That will not do. It would be tolerating charges in the public press against individuals simply under color of what was claimed to be a criticism. It may be said here that the motive was an honest one, but I hardly think that with an honest motive a journalist has a right to proclaim to the world that a particular individual is a thief or a murderer, or that he has committed any other crime in the catalogue of crimes. The only thing that can justify that is that it is true. Under our law, if it is true he can make it. All public men, if this were the rule, would be at the mercy of every journalist, and they could launch charges against such a man with entire impunity. I do not feel inclined to adopt any rule which would allow such a license; therefore, as to that plea the demurrer is also sustained.

MR. DEXTER.—I have not understood that your Honor or Judge Davis decide that the article complained of contains a charge of feigning insanity, but simply that whether that charge was contained would be a question for the jury, and that if contained, it would be libelous. I suppose your Honor does not mean to say that we must justify an assertion when there might be doubt as to whether it was actually made?

THE COURT.—I understand the plea of not guilty puts that in issue. They make this statement in the declaration with

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innuendoes and we have to take them as they are alleged. They say that when you made this publication you meant so and so. I make no decision, of course, as to whether you did or did not mean so and so.

DAVIS, J., Concurring.

For the rules as to construction of libel and justification, consult *Whitney vs. The Janesville Gazette* June, 1873, 5 Chicago Legal News, 469, to appear in subsequent volume of these Reports, and notes thereto appended.—[Reporter.]

THOMAS H. O'NEIL vs. THE WABASH AVENUE
BAPTIST CHURCH SOCIETY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—AUGUST,
1867.

1. CONVEYANCE DOES NOT RELATE BACK TO CONTRACT.—A deed made in pursuance of a recorded contract does not relate back so as to cut off intervening equities, and convey the title as of date of contract. *Snapp et al. vs. Peirce, et al.*, 24 Illinois, 156, criticised.

2. EFFECT OF RECORDING LAWS.—They only enable the purchaser to compel the consummation of the title under the contract; but where the contract is subject to forfeiture, and only a small part of the purchase money, was paid, the conflicting interests should be adjusted by a court of equity.

3. JUDGMENT BEFORE CONVEYANCE.—The legal title remains in the vendor until the conveyance, and a judgment against him binds his interest in the land.

Ejectment for the recovery of a lot in Chicago, a part of the southwest quarter of section 22, township 39, north of range 14, east of the 3d p. m., commencing at a point 350

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feet south of the southeast corner of lot 6, of block 4, of Clarke's Addition to Chicago, thence south 65 feet to 18th street, west 191 feet, and thence north 65 feet, the property being the lot on the northwest corner of Wabash avenue and 18th street.

DRUMMOND, J.—The title was admitted to be in Stephen Bronson, Jr., on the 18th day of June, 1852. On that day Bronson made a contract with the plaintiff, by which he agreed to sell him the lot on certain terms, the money to be paid in installments. The contract was recorded on the day it was made. Bronson conveyed the land to the plaintiff in 1865. This was the title shown by the plaintiff.

At the time Bronson made the contract with the plaintiff, there was only a nominal sum paid in money, viz., \$12.09, a note was given payable in ninety days, \$180.59 was to be paid on the 18th day of June, 1853, and the same sum on the 18th of June, 1854, and the 18th of June, 1855; and the contract provided that if default was made in any one of the payments as therein mentioned, the whole contract was forfeited, time being made of the essence of the contract. None of the money was paid according to the terms of the contract, and a judgment was recovered against Bronson in the Circuit Court of Cook county on the 14th of day of June, 1855. At that time Bronson was the owner of the legal title, and all that could be said of the title of the plaintiff when acquired by him was that, under his contract, he had an equity to be enforced before the proper tribunal. Under this judgment an execution was issued, the property was sold, and a deed made by the sheriff, under which the defendant claims.

All these proceedings took place prior to the execution of the deed by Bronson, under which the plaintiff claims, and the question is: Where was the legal title at the time of the commencement of this suit?

This action was brought in consequence of a decision of the Supreme Court of this state, *Snapp, et al. vs. Peirce et al.*,

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24 Illinois, 156; and if that decision is correct and binding upon this court, it may be said to rule this case.

In that case Patton executed a bond for a deed to Peirce, which was duly recorded on the 4th of April, 1836. Afterward Patton mortgaged the same premises to another party, and the mortgage was foreclosed.

The case does not state when the mortgage was executed, but only when it was recorded. Prior, however, to the recording of the mortgage, Patton executed a deed to Peirce, which was recorded after the mortgage was recorded. The question, therefore, before the court in that case was as to the effect of the deed from Patton to Peirce, and the court say that if it was executed in pursuance and in satisfaction of the bond for the deed of Patton to Peirce, then the deed related back to the date of the bond, and conveyed the title as it stood at the time the bond was recorded. That is to say, it necessarily cut off all equities that existed between the date of the execution of the bond and the date of the deed.

It is claimed that such is the effect of the deed of Bronson to the plaintiff in this case; that, being made in pursuance of the contract of 1852, it puts an end to the judgment which was obtained against Bronson in 1855, as a lien upon this land.

I confess that there seems to me to be a misapprehension of the effect of the recording laws by the Supreme Court in the case of *Snapp vs. Peirce*. It is true, that where a man makes a contract with the owner of a tract of land, by which, in consideration of certain payments to be made to the owner in the future, a deed is to be made after the payment, and the contract is recorded, nothing which the owner can do subsequently can deprive the vendee of his rights under the contract when he has complied with its terms; but I do not understand that the effect of the recording law is anything more than to compel the consummation of the title under the contract, when its terms have been complied with. It seems to me that, under such circumstances, where

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a contract of sale is made, and only a small part of the purchase money paid, and a judgment is afterward obtained against the owner of the land, that judgment binds his interest, whatever it may be, and it is subject to sale under that judgment. It is a doctrine attended with very serious consequences, to hold that, under such circumstances, when a deed is made by a vendor to a vendee, it relates back so as to cut off all equities which may have intervened, and of which it may be the whole world would be obliged to take notice.

In this case the contract under which the plaintiff claimed was a stringent one in its terms. Time in the payment of the money was made the essence of the contract. That money never has been paid.

It seems to me that the only safe course to pursue is to leave a court of equity to deal with the equities of notes or bills given for the payment of money under such a contract as this—whether they are held by the original party who made the contract, or transferred to a third party for value. It is easy to perceive that circumstances may exist where it may be of the utmost consequence that the rights and equities of parties in possession of such evidence of indebtedness should be protected.

I cannot, therefore, give my assent to the application of the case of *Snapp vs. Peirce*, to the facts of this case. Indeed, it seems to me that the principle there stated, in the extent to which the language of the opinion would seem to carry it, cannot be sustained. Without, therefore, deciding many of the questions which were argued in this case, and which are, undoubtedly, of considerable interest and importance, I find the issue for the defendant, on the ground that the legal title was not in the plaintiff. At the time that Bronson made the deed of 1865, his title was gone; and I do not think that that deed related back to the contract of 1852, so as to put an end to everything that had been done in relation to the land between the date of the contract and the date of the deed.

Judgment for defendant.

CHARLES CLARK vs. CITY OF CHICAGO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH,
1868.

1. STEPS IN SIDEWALKS—DUTY OF CITY.—The mere existence of a descent or step in the sidewalks of a city is not such a defect as to render the city liable for accidents to passengers in stepping from one elevation to another; the question is, whether the sidewalk or descent was properly constructed, in reference to the character of the city and condition of the streets.

2. ICE UPON SIDEWALKS.—The city is not bound, under all circumstances, to keep the sidewalks free from ice; it is only required to exercise reasonable diligence under the circumstances of the case.

DRUMMOND, J., charged the jury as follows :

The plaintiff on the morning of the 6th of February, 1866, was walking along the street at the corner of Randolph and Wells streets. Stepping upon what is called an apron, which, it is alleged, had some ice upon it, he slipped, fell and broke his leg. Doctor Pope was called in to set his leg. The healing process did not go on satisfactorily, and the surgeon came to the conclusion that it was necessary to amputate the leg, and called in Dr. Burgess, and at the end of a few days it was amputated, when hemorrhage set in, and other unfavorable symptoms. It was amputated again, and finally the patient's life was saved. For the injury resulting from this fall, and in consequence of alleged negligence on the part of the city, this action is brought.

The first question to be determined is, whether it can be maintained under the circumstances of the case. That depends upon two questions.

First, was the city guilty of negligence as to the manner in which the apron was constructed, or as to the manner in which it was occupied and maintained at the time ?

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Secondly, was the plaintiff guilty of any negligence which contributed in any considerable degree to the result?—because, even admitting that there was negligence on the part of the city, if the plaintiff was guilty of any negligence which contributed to the result, he cannot maintain this action against the city.

The first question is one of law and of fact, and which the jury, under the direction of the court, is to decide.

This apron, as it appears, consists of boards or planks, constructed for the purpose of enabling passengers to pass over the space where the water flows down to the sewer and is carried off. This particular apron was not even with the sidewalk in passing across Wells street from the west sidewalk to the roadway of the street, but there was a descent or a step from the sidewalk down to the apron, and in stepping from the sidewalk to the apron the plaintiff slipped and fell.

In determining this question, of course we have to look to the nature and object of the apron, and the mode and manner of its construction. In the first place, was it properly constructed? Was it placed in such a position as to be safe with reference to the grade and structure of the streets and to the object in view? Secondly, was it kept and maintained properly at the time; that is to say, looking at it in its position as it then was, was it unsafe—was it dangerous?

In a city like this it cannot be said that the mere fact that there is a descent or a step from a higher to a lower elevation of the street or sidewalk constitutes a defect of such a character as to render the city liable for any accident which a passenger may meet with in stepping from one level to another. In properly grading the streets, it is impossible that there should be a smooth, level walk in all places. Therefore, it is not, I think; such a fault or defect as to make the city liable simply because there was a step from a higher to a lower level.

Still, it is the duty of the city in constructing these

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aprons to have reference to the condition of the crossing at the place where they are constructed. What might be suitable in one place might not in another. There should be a fitness in things, looking at the grade and condition of the streets at the time. We have to build the streets gradually. We have to bring them up to grade gradually. We cannot expect the city to make complete streets at once. We must interpret their duty upon a reasonable basis in reference to the actual condition of affairs, and not require impracticable things from the city authorities. Looking at it in this light, was this apron constructed properly under the circumstances of the case? If it was, then, as a matter of course, so far as the structure is concerned, there was no fault on the part of the city.

Then, was it maintained properly?—that is to say, in a proper condition.

The ground assumed on the part of the plaintiff is that ice was suffered to accumulate there, in consequence of which the accident happened.

We must also, in looking at the question in this light, consider the circumstances of the case, and construe the duties of the city and its officers with reference thereto. The law requires of the city that it should keep its streets and sidewalks and crossings reasonably safe, all things considered. It does not require impossibilities, nor what is impracticable.

I could not, then, instruct you that it was the duty of the city, under all circumstances, to remove the ice in mid-winter from the streets and crossings. That might be impossible. You must look at the question, therefore, by the light of the circumstances existing at the time, the state of the temperature and of the weather, taking all these things into consideration. Was it something required of the city and of the officers of the city that the ice at this particular apron should be removed at that time?

It must be admitted that while it was not the duty of the city, under all circumstances, to remove the ice from the

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streets or crossings, still, if there was anything out of the ordinary course of things which rendered the sidewalk and crossings especially dangerous, and which could have been removed, that it ought to have been done. For example, if there should be on one of the aprons, or at one of the crossings, anything which in its nature was especially dangerous, it would be the duty of the city to cause it to be removed. If there was an accumulation of ice which rendered that crossing especially dangerous, I think it was the duty of the city to remove it, while it might not have been its duty to remove entirely the ice from the apron. We have to apply a reasonable rule to the officers of the city in determining what is their duty in the premises. No absolute, inflexible rule can be laid down. You have to judge of the action of the city under the special circumstances of the case.

I cannot, therefore, instruct you that the mere fact that there was ice upon this apron in the early part of February, 1866, did of itself, irrespective of all other circumstances, constitute negligence on the part of the city. I would not impose so harsh a rule upon the city authorities as to require them to cause all the ice that should be upon the sidewalks or crossings, at such an inclement season of the year, to be removed.

Verdict for defendant.

E. R. FANSHAWE vs. JOHN F. TRACY, ET. AL.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—

APRIL, 1868.

1. **PRESERVING RIGHTS PENDING MOTION FOR INJUNCTION.**—On the filing of a bill praying an injunction, it is proper practice for the court to make an order that the defendants do nothing prejudicial to the rights or interests of the complainants, pending the hearing of the motion for the injunction.

2. **PRACTICE IN ALLEGED CONTEMPT.**—The established practice in this court, when affidavits are filed charging any person with disobedience of the orders or process of the court, is to enter a rule on him to show cause why an attachment should not issue.

3. **90TH RULE OF SUPREME COURT.**—Such a practice is not in conflict with the Ninetieth Rule of the Supreme court, but comes within the exception in that rule.

4. **ATTACHMENT IN FIRST INSTANCE.**—It is, however, competent for the court, in its discretion to issue an attachment in the first instance, and without any rule to show cause.

5. **EFFECT OF SUPPLEMENTAL BILL.**—The filing of a supplemental bill, for the purpose of bringing some of the defendants into contempt, is not a waiver of the rule *nisi* previously entered.

6. **CONTEMPT IS AN OFFENSE AGAINST THE UNITED STATES.**—A proceeding for contempt, though growing out of a civil action, is distinct in its character, and is really a proceeding on behalf of the United States, against whose authority the offense was committed.

7. *It seems*, that if a man imprisoned for contempt of a federal court, breaks jail and escapes to another state, he can be arrested and returned.

8. **OFFICERS OF CORPORATION—WHEN IN CONTEMPT.**—Officers representing a corporation defendant are not in court for the punishment for contempt unless they personally knew of the order, the disobedience of which is alleged.

9. **SUBSEQUENT ARREST.**—Persons guilty of contempt can be arrested at any time thereafter, when they come within the jurisdiction of the court.

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10. PURGING CONTEMPT.—The court will, at any time, give the party alleged to be in contempt full opportunities to be heard.

DRUMMOND, J.—The question argued is of considerable practical importance.

The practice in this district has been, when affidavits are presented charging a person with the violation of an order of the court or of an injunction, for a rule to show cause to issue, requiring him to appear in court and furnish some good reason why an attachment should not be issued against him. It has also been supposed to be within the power of the court to issue an attachment in the first instance without the necessity of a rule to show cause.

A bill was filed by Edward R. Fanshawe against the Chicago, Rock Island & Pacific Railway Company and other parties, in March last, and, as the bill asked for an injunction among other things, some of the parties appeared in court, and the usual order was taken according to the practice of the court, that nothing should be done prejudicial to the rights of the plaintiff until the motion for an injunction should be heard.

This practice has been very commonly adopted where the plaintiff or the court is not ready to hear the motion, or to enable the defendant to prepare for the hearing, so as to protect the rights of the plaintiff. It has been supposed that in this way the rights of all parties would be protected; and, where special injunctions are asked, the act of Congress¹ and the rule of the court require that notice shall be given. In this way all parties have an opportunity of being heard before the injunction is issued. At the same time, it is apparent that irreparable injury might be done to the rights of the plaintiff, provided the order of the court which is entered in such case should be disregarded. Therefore it is that this

¹ U. S. Statutes at Large, 884, § 5.

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practice has prevailed—a practice which I must think is a salutary one and calculated to promote justice.

After this order was made, a supplemental bill was filed. New parties were added and some new facts were stated. There were such circumstances stated in the supplemental bill, that, on application of the plaintiff, an attachment was issued against certain parties, and a rule to show cause issued as to others, for an alleged disobedience of an order of the court.

I do not propose at this time to go into the propriety of the order of the court then made. In point of fact, none of the parties against whom the attachment was directed have been arrested, and some of the parties against whom the rule to show cause was entered have appeared and filed affidavits. All of the parties, or nearly all, have appeared and have objected to the order of the court made at the time, on various grounds which I propose now to consider.

In the first place, it may be necessary for us to examine the Ninetieth Rule of the Supreme court in cases of equity, because it is upon that rule that the parties rely, as showing that the practice adopted by the court in this case was irregular and improper and ought not to have been adopted.

That rule is as follows: “In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied, consistently with the local circumstances and local convenience where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.”

Of course the first question is : What was the rule in England in the High Court of Chancery?

Mr. Daniell says, “The remedy in the event of the breach of an injunction or restraining order is by committal.”¹

¹ Daniell's Chancery Pleading and Practice, 1688.

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"The order for committal is obtained upon motion, of which notice must have been duly served personally upon the person committing the contempt," and it is to be observed that "the terms of the notice of motion should be that the party 'may stand committed' * * * for breach of the injunction,"¹ and not that he may show cause why he should not be committed.

Rather refined reasoning, it must be confessed. The notice must be that the party may stand committed, and not that he may show cause why he should not be committed. "The plaintiff may also, it seems, obtain an order *ex parte*, that the defendant may stand committed on a certain day unless he shows cause against it, which order must be personally served upon the party to be committed."² So this is an addendum which has been made under the practice in England, according to this order, that the plaintiff may obtain an order *ex parte* that the defendant may stand committed on a certain day unless he shows cause against it; that is, the party may take a rule *nisi*.

It would seem that, so far as the defendant is concerned against whom the proceeding is sought, it is not really worthy of controversy, whether he is served with a notice that the motion will be made in court that he stand committed for a breach of the injunction, or is served with a rule to show cause why an attachment should not issue against him for the breach. If there is any difference, the latter is in his favor, being not so direct and peremptory as a notice of a motion that he be committed, because when that motion is heard, unless he gives a satisfactory reason, he is committed of course; whereas, in the other instance a rule to show cause might be asked in the first place, then an attachment be issued, and, when brought in under attachment, he

¹2 Daniell's Chancery Pleading and Practice, 1685.

²*Id.*

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has a right to purge his contempt. In the first place, then, the court may refuse to issue the attachment, and secondly, the court may refuse to commit when the attachment is returned.

In the last instance, different from what it is in the other, when the notice is given that he stand committed, the party may pay no attention to it; the court may not have absolute power over the offender; but where the attachment issues, and he is brought into court, if he does not purge himself of the contempt, then the court has control over him; and so concerning that rule there does not seem to be very much difference in the mode of practice.

Mr. Justice McLean has said,¹ that a rule to show cause why an attachment should not issue for breach of an injunction, was not the mode of proceeding in that court, but that it should be a motion that the defendant stand committed for the breach of injunction and notice given of that motion, following in this respect a case decided by Lord Eldon which,² however, seems to have been a modification of the old practice, because Mr. Daniell admits that the old practice was that the attachment might issue and not notice of the motion; that is, the attachment might issue in the first instance.

Mr. Justice Miller has also followed the decision of Lord Eldon and of Mr. Justice McLean in holding that there should be a notice of the motion that the party stand committed for the breach of the injunction.³

As I have already said, there is a great deal of refinement in the distinction between the two cases.

The practice in this district for twenty years, and perhaps longer, has been for a rule to show cause to be entered in the first place; and the question is whether this comes so directly in collision with this 90th rule of the Supreme

¹ *Worcester vs. Trueman*, 1 McLean, 483.

² *Angerstein vs. Hunt*, 6 Vesey, 488.

³ *Gray vs. Chicago, Iowa & Nebraska R. R.*, 1 Woolworth's C. C. Rep., 68.

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Court that, after a rule to show cause has been issued, we are to abandon the whole proceedings, and quash them simply upon that ground.

I think that the case comes directly within the 90th Rule of the Supreme Court, which is that where the rules prescribed by "that court, or by the circuit court do not apply," the practice in the High Court of Chancery in England, is to apply. If there be a distinct rule of this court applicable to this case, it is within the exception of the 90th rule, and the practice of the court, I think, is to all intents and purposes the rule of the court. Certainly the difference between the two is not so material, nor important, nor attended with such serious consequences, as to make it indispensable that the court should drop a practice which has been followed for so many years, and for the reason that I have already given. It is really a distinction without any substantial difference,—a notice of motion why the party should not stand committed for contempt, or a rule to show cause why an attachment should not issue. Whatever difference there is, is in favor of the defendant.

I do not, therefore, feel inclined, simply because a different practice has been followed in other districts, to abandon a practice which has been pursued for so many years in this district. I have no sort of objection, certainly, that the practice of the court should be in accordance with the practice adopted by Judge McLean in Ohio, and Judge Miller in Iowa. I submit the question to my brother judge, and if he thinks there is any material difference, and that it is desirable the practice throughout the districts should be uniform, I am perfectly willing that the practice in this district should conform to that of other districts. But still, it is simply a matter of practice, the courts reaching the same conclusion in a little different form, and in no essential particular jeopardizing by the change of form the rights of the parties.

Besides, the language of the rule is express, that the practice of the High Court of Chancery of England is not to be re-

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garded as positive rules, but as furnishing just analogies; so that it would be competent, I apprehend, for this court to adopt its own practice in relation to this matter. If it were a question *de novo*, coming up for the first time, it would still be competent for this court to make its own rule upon the subject, even under the express authority of this 90th rule in equity.

This being so as to the first point, the next question is, whether it is competent for the court to issue an attachment in the first instance, instead of a rule to show cause.

The practice has been very general to issue in the first instance a rule to show cause. At the same time, as I apprehend, it has not been doubted—and I do not feel inclined now to doubt, even after the argument of the counsel in this case—that the power exists in the court, under circumstances where in its opinion such an order is necessary, to issue an attachment in the first instance without issuing simply a rule to show cause. I think the practice in this state is quite common, in the courts of chancery, for an attachment to issue in the first instance. It certainly was familiar to me in my practice when I was at the bar, and some cases have been cited from the Supreme Court where it appears to have been done. Though it is not and ought not to be regularly done, I cannot doubt the right of the court to issue the writ, and it seems to me that there might be circumstances where the court would be shorn of its power to give remedial justice unless it possessed the authority to issue an attachment.

That being so, it is simply a question of discretion on the part of the court. Of course it is always competent for the parties to come in and ask the court to revise its judgment and opinion in a particular case, and it will always afford me pleasure to give counsel an opportunity of being heard in any such case.

Then, as to the effect of the supplemental bill which was filed: It is claimed that that was a waiver of the order of the court. I do not well understand how that could be true

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in this case, because after the order of court was made upon the filing of the original bill, the supplemental bill, containing allegations which appealed to the court for its remedial power over the parties, was filed for the purpose of compelling them to observe the order of the court already made. It would be a singular state of facts that an amendment to a bill in which the court was called upon to interpose its strong arm to enable a party to have redress in a particular case was to operate *ipso facto* to defeat the whole object sought. I concede that there may be cases of an amendment to a bill, or of a supplemental bill, where it would be a waiver of an order of the court or of an injunction, as in the case cited where the party was under an order to answer, and an amendment of the bill was made which would affect the answer. In such a case as that it would undoubtedly be a waiver of the order to answer, and if the party was in contempt it might be a waiver of the contempt. The true rule, I take it, is this; that, where the amendment to the bill or character of the supplemental bill affects substantially the order of the court, and brings up facts which are inconsistent with the action of the court, that would constitute a waiver of the contempt or of the injunction, but not otherwise.

Then, as to the third point: That point is, I apprehend, well taken. It was not the intention or the purpose of the court that this order should operate upon any other party or corporation than those within the jurisdiction of the court, and who had had notice of the proceedings in court. It was not intended to operate upon any foreign corporation.

Perhaps it may be proper for me to make a few remarks upon the general scope and effect of the proceedings for contempt, about which there seems to be some difference of opinion. As I understand it, a party against whom proceedings for contempt are instituted—a party who has conducted himself in such a way as to justify the court in punishing him for contempt, or for the disobedience of its order—has committed an offense against the United States. The court is the mere

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instrument, or organ, of the Government, in punishing the person for the offense which he has committed. As I said during the argument, if he is imprisoned by order of the court, it is the act of the United States. The United States is the custodian of his person. If he is fined by the court, the fine goes to the United States, and although it may be a proceeding growing out of a civil action, it is distinct in its character in many of its essential particulars. The parties may not have, do not have, absolute control over that proceeding. The United States is the party to the proceeding, and not the mere defendant or plaintiff upon the record. It is not a crime in one sense, but it partakes of the nature and character of a crime, and I do not see, with all due respect to some of my brother judges who differ from me, why, if a man is imprisoned for a contempt of a court of the United States, and breaks jail and escapes into another state, he cannot be arrested and returned to his imprisonment under the authority of the United States.

The Supreme Court of Pennsylvania, in a case which was quite notorious at the time,—the case of *Passmore Williamson*,¹ where the District Court of the United States had imprisoned a party for a contempt of the District Court,—says, on an application to release him from his imprisonment, “The commitment shows that he was tried, found guilty and sentenced for contempt of court and nothing else. He is now confined in execution of that sentence and for no other cause. This was a distinct and substantive offense against the authority and Government of the United States.” If it is not, what is it? What is the nature and character of the offense that the party has committed? Is it an offense against a party to the suit? Not so. It is true that the party to the suit may ask the punishment of the offender, with a view of promoting the civil remedy, but that is not the sole

¹ 26 Pennsylvania State, 9.

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object sought in punishing the offender. That is not the meaning of the law of the United States which declares that a court can punish the offender by fine and imprisonment, and as to the law of 1831, which was referred to, the power of the court as to this is not changed by that law. The Supreme Court of Pennsylvania further says in the same case, "It must be remembered that contempt of court is a specific criminal offense." I do not go quite so far as that, but I say that it partakes of the nature of a criminal offense.

But the Supreme Court of the United States, in *Ex parte Kearney*, 7 Wheaton, 38, speak of the punishment, not as a judgment in the case of a contempt, but as a conviction, as though the party were tried for crime. They say that the order of the court imprisoning or fining the party is a conviction, and that case is cited in the case of Williamson, *ante*. That court says "the contempt may be connected with some particular cause," &c. But in point of fact the practice in this state always is, in case of contempt, a proceeding on the part of the people; and the practice has been in this court to treat it as a proceeding on the part of the United States.

MR. HOYNE.—We can have those parties discharged who are not in court.

THE COURT.—There has never been an order against anybody not in court. The officers of a corporation are part of the corporation, and when a corporation is in court, the officers for certain purposes are also in court, but I do not understand that such officers are in court for the purpose of punishment for contempt unless they have knowledge of the action of the court upon the corporation, so that if any of the officers are in court simply from the fact that they are such officers, they are not legally in court to be punished for contempt unless they had notice of the order of the court. If there is service upon the corporation, and any of the officers, knowing of the order of the court, disobey the order, I think they are guilty of contempt and are punishable for the contempt, although there may be no personal service upon them, because

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the corporation is in court, and they are also in court for that purpose if they had notice.

MR. HOYNE.—No further proceedings will be taken until they are advised, that they may make their showing without coming personally to court. Their business is such that it is inconvenient for them to come.

THE COURT.—Certainly. According to the opinion of the district judges of the Southern District of New York and of Iowa, the parties who reside in those two districts cannot be reached in any way at present, as they think there is no authority, for various reasons (they differ, I believe, as to the reasons), to arrest them and transfer them to this district; but as the matter now stands, whenever these parties come within this district, I hold that it is competent for this court to arrest them and bring them before the court. Therefore, of course, it is desirable that they should understand the view of the court, and that it will always be competent hereafter to cause these parties, whenever they come within its jurisdiction, to be brought before this court.

In re Parker.

In re RENSLOW S. PARKER.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—
JUNE, 1868.

IN BANKRUPTCY.

A discharge will not be withheld from a bankrupt for not scheduling property in which he did not at the time know that he had a substantial interest. There must be an intention to conceal the property.

Application for discharge. Attorneys for creditors objected that the bankrupt had not scheduled certain interests in personal property belonging to his wife before marriage, but which they claimed vested by marriage in the husband. The marriage was in 1859, at which time the wife had about \$1,500 in cash in her own right, and which came into his hands soon afterward, and before the passage of the act of 1861. This money he had used from time to time as his wife's and for her benefit.

DRUMMOND, J.—The language of the law is, "or if he has concealed any part of his estate or effects, or any books or writings relating thereto." Does not that mean if there was the intention to cover up and conceal property, that the will must have taken part in the effort to conceal? Suppose this man fairly believed, in good faith, that he had not a good right to this property, but that the right was in his wife, whereas, in fact he had the title, what then?

It might well happen that a man would have title to property that he would know nothing about. I apprehend that if he did not schedule it, that would not prevent his discharge in bankruptcy. The assignee can claim the property.

The facts as they appear in evidence are these: He was married in 1859. At the time of his marriage his wife had

In re Parker.

\$1,500 in her own right. This came into his hands, subject to his control, in a year after the marriage, apparently before the act of 1861¹ in relation to married women's property went into operation. He had used this money or property from time to time as his wife's,—that is, for her benefit. That he kept it thus, entirely distinct in all instances from his own property, is his own statement, corroborated, to some extent, by that of his wife; that when he has operated with it he has operated with it as her money; that he did not make any entries in relation to it,—which, by the way, I think he ought to have done,—but he always kept it distinct and separate; that he turned this property or money into assets of various kinds, as bonds or stocks, or anything of that sort, which was evidenced on paper of various kinds; that he turned them over to his wife as her property, and when he wanted to use them again, for the purpose of making some other transaction, he took them and used them in the same way he had previously used the money; that, operating in this way for a series of years, this fund had accumulated some few thousand dollars, and, after it had thus accumulated,—the intent and motive of both parties, as they say, being, to appropriate it to the purchase of a home for themselves,—they purchased property on Wabash avenue, for which they paid about \$4,500 cash, the whole purchase price being \$9,000.

There may be a very important question, and one, perhaps, not entirely free from difficulty, as to the interest of the bankrupt in that property. The ordinary rule undoubtedly is, or was before the act of 1861, in this state, that the marriage of a woman transferred by operation of law all her personal property to him. But, as I understand this law, in order to prevent the discharge in bankruptcy (because it will be recollected that we are not deciding whether any interest in this property belongs to the assignee or not, but whether the

¹ 1 Gross' Statutes, Chap. 69 a.

The Monitor.

bankrupt has concealed this property) there must have been on his part a voluntary concealment of property; that is to say, he must have had the property, knowing that he had it, and he must have concealed it. The language of the law means to hide, to secrete. I apprehend that there can be no doubt that where a man owns property of which he has no knowledge, as often happens, that the fact that he did not put it in his schedule would not prevent his discharge.

There being no other ground of opposition, the discharge will be issued.

Consult *In re Robert H. Shoemaker*, ante page 245, and notes to same.—[Reporter.

THE MONITOR.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—
JULY, 1868.

IN ADMIRALTY.

1. COLLISION WITH VESSEL AT DOCK.—A canal-boat moored at a certain dock by the order of the harbor-master is lawfully there, even though it be at a narrow place in the river.

2. DUTY OF TUG.—A tug with a tow must maneuver cautiously and prudently; and suction of the water from a passing vessel is one of those natural incidents which she must guard against.

DRUMMOND, J.—The canal-boat Preston, which the libellant owned, was, at the time of the collision, at the dock below the tunnel passage, as it is called, in the Chicago river, at Washington street, or was in the act of getting to the dock. On the part of the libellant's witnesses it is asserted that

The Monitor.

the canal-boat was at the dock below the tunnel passage. On the part of the defense several of the witnesses state that the canal-boat was in the passage when the Monitor, having in tow the bark John Bell, came up the river, and the John Bell came in collision with the canal-boat.

Whichever hypothesis be true,—whether she was in or below the passage moored at the dock,—I think that the libellant is entitled to recover, because the canal-boat had a right to pass down through the tunnel passage, and it had a right to be moored at the dock, because the harbor-master had given express instructions for mooring the canal-boat at that place; therefore, the canal-boat was in a lawful position, or acting lawfully, and it was the duty of the Monitor to avoid coming in collision. If the canal-boat was in the passage they should have held up entirely, or should have gone so slowly as to have rendered the collision of no consequence; or if she was at the dock, of course it was the duty of the Monitor to avoid the collision.

Which is liable? I confess that I have not seen anything in the evidence to satisfy me that there was any fault on the part of the John Bell. Taking the proof as it is, she followed the Monitor in tow.

The collision might have been the result, as it is claimed, of the suction of the water forced by the passage of the Bell; but that is one of those natural incidents which the tug was bound to guard against just as much as anything else in such a narrow passage, and it is a lesson which these tugs must learn if this court can teach it to them,—that they, in going through these dangerous, critical places, must use greater precautions than they do; and there is nothing that will teach them except compelling them to pay. It was clear to those who had charge of the tug that there was a canal-boat there. It was in open daylight. There was nothing to prevent them from seeing what was there, and instead of taking care to guard against it, they rushed headlong at an ordinary rate of speed, and let the weakest take care of

Hobson vs. Johnson.

herself. That is a rule that will not do in such a narrow thoroughfare as the Chicago river, and especially when they were tunneling the river. The tugs must be more careful. It is not a question whether they will get through with a tow and be ready five, ten, or fifteen minutes sooner to take another, but when they are engaged in their business they must do it carefully, cautiously, and prudently, with regard to the rights of others. I have no doubt of the liability of the tug.

Decree for Libellant.

As to the caution required of a tug moving in a crowded harbor, see *The Little Giant*, Vol. 2 of this Series, 23, and *The Alleghany*, *Id.*, 29.—[Reporter.

HOBSON vs. JOHNSON.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER,
1868.

JUSTIFICATION BY SURETY.—The affidavit of the surety on an appeal bond, as to his responsibility, where he does not personally appear, is not sufficient; there must be independent evidence of his responsibility.

Defendant's attorney presented an appeal bond signed by himself and sureties, all resident in Lee county, Illinois.

DRUMMOND, J.—Where a bond is given by a person at a distance it should be accompanied by the certificate of an officer who has knowledge of the party. It is not sufficient to present the affidavit of the surety. If counsel will satisfy me of the responsibility of the parties by any one the court can examine as to their pecuniary condition, then I would accept the bond. I have never been in the habit of accepting a

In re O'Mara.

bond upon the affidavit of the surety, unless there is no objection. If there is objection made, there must be independent evidence — evidence of a reliable person who is acquainted with the pecuniary circumstances and condition of the parties.

In re MICHAEL O'MARA.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER, 1868.

IN BANKRUPTCY.

Where a bankrupt is under arrest under process from a state court, he should make application to that court, before coming into the court of bankruptcy to obtain his release. This practice is less likely to produce conflict of jurisdiction.

Motion to discharge the bankrupt from arrest on *ca. sa.* issued from the Circuit Court of Cook County.

DRUMMOND, J.—I do not at present feel inclined to make an order in the case. I wish, in all cases, to avoid a conflict of jurisdiction. Where a man is arrested under the authority of a state court, the application should in the first instance be made in the state court for his discharge, not only on grounds that the state law will warrant, but on the ground that the bankrupt law authorizes his discharge. It is not necessary that the party should apply here. I suppose that the bankrupt law applies to all courts. I do not like to have

Bank of Danville vs. Travers.

any conflict of jurisdiction. I was obliged in one instance, where an application was made to a state court and refused, to grant an order; but that was done by consent when the court intimated an opinion upon the subject.¹

The question is suspended, so that the counsel may renew upon notice.

BANK OF DANVILLE vs. ELIZA TRAVERS.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—DECEMBER, 1868.

IN CHANCERY.

A motion to suppress depositions for irregularity comes too late when they have been on file for three years.

Motion to suppress depositions for insufficiency of the notarial certificate, the depositions having been returned and opened in July, 1865.

J. H. Knowlton, for the motion.

DRUMMOND, J.—I think after a cause is set down for hearing, and the deposition has been on file for three years, it is too late to move to exclude it on a technical ground.

¹ *In re Wiggers*, Vol. 2 of this Series, p. 71.

Downs vs. Supervisors of Rock Island County.

I think the parties have a right to presume that such a delay is a waiver of any objection of that kind.

The general rule is that all objections or exceptions to the formality of depositions must be taken before trial. *Oorgan vs. Anderson*, 30 Illinois, 95; *Swift vs. Castle*, 23 do., 209; *Frink vs. McClung*, 4 Gilman, 569; *Moshier vs. Knox College*, 32 Illinois, 155. But as to substance it is sufficient to make them on the trial or hearing. *Swift vs. Castle*, and *Frink vs. McClung*, *supra*.—[Reporter.

DOWNES vs. BOARD OF SUPERVISORS OF ROCK
ISLAND COUNTY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—
JANUARY, 1869.

SERVICE OF MANDAMUS.—A writ of mandamus against a Board of Supervisors, whether alternative or peremptory, should be served upon the individual members. An acceptance by the clerk, although "by order of the Board," is not sufficient.

Alternative writ of mandamus was served on the clerk of the Board of Supervisors of Rock Island County, and service admitted by such clerk, "by order of the Board."

Application was made that a peremptory writ issue.

DRUMMOND, J.—This mode of return is objectionable. I think that the officer ought to serve the writ on the parties themselves and return the fact that he has done so. This might give rise to controversy; still, under the special circumstances, I will give you the peremptory writ, but I think that ought to be served on the individual members of the Board.

United States vs. Durling.

THE UNITED STATES ETC., vs. JOHN P. DURLING.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—
JANUARY, 1869.

1. **RECOGNIZING WITNESSES—DUTY OF DISTRICT ATTORNEY.**—It is the duty of the District Attorney, in criminal prosecutions by the Government, where he has any doubt whether witnesses will attend, to have them properly recognized.

2. **TRAVELING EXPENSES—TENDER.**—If a witness subpoenaed by the Government, has means to travel, it is not necessary for the officer to tender his traveling expenses; and the court will attach a witness who, on that ground, neglects to attend.

3. The officer summoning witnesses should see that those who have no means to travel, are provided with necessary funds.

DRUMMOND, J.—I wish to lay down a few rules upon this subject as a guide to the district attorney, upon which I will insist hereafter when this question comes up again. It is always within his power, under the law, where a person is within the jurisdiction of the court, and he doubts whether he will be present on the trial of the cause, to compel him to give security that he will be present at the trial; so that it was competent for the district attorney, when these parties were here and he doubted whether they would be present when the case was called for trial, to have them brought before a competent officer and recognized, and give security that they would be present. The law goes so far even as to declare that, in a criminal case, if they cannot give security they may be imprisoned until the trial, in order that their testimony may be given.

Again, where there is a witness residing in another district, the process of this court goes to that district. It is issued to the marshal of that district, and it is the duty of the person to

United States vs. Darling.

whom it is addressed, if he has the means, to travel here to give his testimony. If he has not, the proper officer of the Government will furnish him with means. It is not necessary, if he has the means, that the fees should be tendered to him before he is required to obey the process. An attachment would issue and the court would punish a man who could pay his expenses and would not come because the money was not tendered. It is only where a man has not the means of paying his expenses, that it is necessary for the money to be tendered to the witness in order to make it incumbent on him to obey the process of the court.

Hereafter, I wish it understood that those witnesses who have not the means of attending court must be furnished with the means when the subpoena is served, and if there is doubt entertained of their being present at the trial they must be compelled to give security; if they fail to do so, they must be held in custody until the trial.

Scanlon vs. Union Fire Ins. Co.

JOHN SCANLON vs. THE UNION FIRE INSURANCE COMPANY OF BALTIMORE, MD.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH, 1869.

CONDITION IN INSURANCE POLICY.—A condition in an insurance policy, avoiding it if the property should be sold or conveyed without the consent of the company, is not broken by the sale of an interest in the property. The policy still covers the interest remaining in the insured.

Action upon an insurance policy for \$2,500, dated September 17, 1867. At the time of the issuing of the policy, the plaintiff was admitted to be the owner of the property insured, but on the 11th of January, 1868, and previous to the fire, he formed a co-partnership with two other parties, and the property insured was put in as partnership assets. The company claimed that this vitiated the whole policy under the clause providing that, "if the said property shall be sold or conveyed, or if this policy shall be assigned without the consent of the company obtained in writing hereon, then, and in every such case, this policy shall be null and void."

DRUMMOND, J., charged the jury as follows :

The question is whether there was, within the meaning of this clause in the policy, a sale or conveyance of the property, in such a way as to render it void.

It is to be observed that the language of this condition is general, "That if the said property shall be sold or conveyed," &c. It is not, that if the property, or any part of it, or any undivided interest in it, shall be sold or conveyed, the policy shall be void ; it is not that if there is any change in the condition of the property, or in the interest of the plaintiff,

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the policy shall be void ; but simply "if the property shall be sold or conveyed." The question is, whether the true construction of this clause is not that, in order to vitiate the policy it is essential that the whole of the interest of the insured in the property shall be sold or conveyed; and such, I think, is the true construction of the condition. In order to avoid the policy, he must sell the whole of his interest in the property, and so long as he holds an interest in the property the policy is binding. It was competent for the insurers to declare that if a part of it were sold, that should avoid the policy. It was also competent for them to declare that if there was any change in the condition or title of the property, that the policy would be void; but that is not this condition.. Therefore, I think the policy covers whatever interest Scanlon owned in the property insured after he entered into the articles of co-partnership, and at the time of the loss.

It is for you to determine what that interest was.

The jury found for the plaintiff, and assessed his damages at \$1,042.50.

For further authorities in accordance with the text, see *Manley vs. Insurance Company of North America*, 1 Lansing, 20.

Contra, *McEwan vs. Western Insurance Company*, 1 Michigan (N. P.), 118.

Where a policy provides that for "any sale, transfer or change of title in the property," it shall be void, the death of the assured and vesting of the title in his heirs renders the policy void. *Tappin vs. Charter Oak Fire and Marine Insurance Co.*, 58 Barbour, 325.

Where one sold property for \$75,000, retaining a lien for \$50,000, it was such a "transfer or change of interest" as to avoid the policy. *Bates vs. Commercial Insurance Co.*, 2 Cincinnati, 195. And if a mortgage for the purchase money is taken back the policy is avoided. *Savage vs. Howard Insurance Co.*, 52 New York, 502, where cases on this point are collated.

Contra, that a sale and mortgage back does not "change the title" to avoid the policy, *Kitts vs. Massasoit Insurance Co.*, 56 Barbour, 177. See also *Burger vs. Farmers' Mutual Insurance Co.*, 71 Pennsylvania State, 422. Consult also 1 Phillips on Insurance, § 880.—[Reporter.]

Currie *vs.* Jordan *et al.*

JOHN CURRIE *vs.* ALLEN JORDAN *ET AL.*CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL,
1869.

REDEMPTION—FRAUDULENT CONFESSION OF JUDGMENT.—Where a judgment creditor, to protect his interest, has purchased the property on foreclosure of a prior mortgage, and the debtor had fraudulently confessed a judgment to enable a third party to redeem the property for his benefit, this court has jurisdiction of a bill for relief filed by the creditor.

DRUMMOND, J.—This is a demurrer to a bill. The only question in the case is whether the demurrer is well taken, and I think it is not.

The facts in the case, briefly stated, are that in 1865 the plaintiff recovered a judgment against Allen Jordan, upon which judgment an execution was duly issued and delivered to the marshal, and a levy made on the property in controversy in this case, but it was not sold, in consequence of Jordan having made a mortgage upon it prior to the time the judgment was obtained. A bill was filed in the state court to foreclose the mortgage, and upon the decree of foreclosure this plaintiff and another party became the purchasers, and after this was done Allen Jordan confessed a judgment in favor of a certain person, and that person came in and redeemed from the decree of foreclosure. Thus it will be seen an attempt was made to cut off the judgment which the plaintiff had obtained in this court, and to prevent it from operating upon the property. The object of the plaintiff in purchasing the property, in this foreclosure suit, being, as he says, simply to protect his interest therein.

The bill alleges that this judgment confessed was fraudulent, and for the benefit of Jordan, to whom the property really belonged.

Northwestern Distilling Co., vs. Corse.

Whatever might be the legal conclusion, as to the right of redemption, if this judgment were for a *bona fide* debt, it is clear where it is a fraudulent judgment, given for a fraudulent purpose, that the party affected by that fraud can file a bill in a court of equity, and ask for relief. That is the claim set up here. I have no doubt, therefore, that a court of equity has jurisdiction of the case to determine the rights of the parties.

The demurrer must be overruled, with leave to the defendant to answer.

NORTHWESTERN DISTILLING COMPANY vs.
JOHN M. CORSE, COLLECTOR, &c.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL,
1869.

IN EQUITY.

An injunction issued by a state court is dissolved by the removal of the cause into the Federal Court.

This was one of several similar bills, originally filed in the Superior Court, to restrain the Collector from paying over money deposited by distillers for Tice meters, which had not been furnished, and which the parties did not desire to take and had no use for. The question was raised whether the injunction issued from the Superior Court was still subsisting

as against the Collector to prevent him from paying over the sums involved in the litigation. The cases were removed from the state court under Section 67 of the act of Congress of July 13, 1866, which provides that any suit or prosecution against internal revenue officers, etc., in a state court may be removed to the United States Circuit Court at any time before trial, upon petition, etc.:

“And the cause shall thereupon be entered on the docket of said court, and shall be thereafter proceeded in as a cause originally commenced in that court; and it shall be the duty of the clerk of said court, if the suit were commenced in the court below by summons, to issue a writ of *certiorari* to the state court, requiring said court to send to the said circuit court the record and proceedings in said case,” &c., “and thereupon it shall be the duty of the said state court to stay all further proceedings in such cause, and the said suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial or judgment therein in the state court, shall be wholly null and void. * * * All attachments made, and all bail and other security given upon such suit or prosecution, shall be and continue in like force and effect as if the same suit or prosecution had proceeded to final judgment and execution in the state court.”

It was argued for the United States that the removal vacated the bond and dissolved the injunction.

DRUMMOND, J.—The only difference in the language of the laws of 1789 and of 1866 is that in the law of 1866, the words are: “All attachments made, and all bail and other security given upon such suit or prosecution, shall be and continue in like force and effect as if the same suit or prosecution had proceeded to final judgment and execution in the state court.”¹

¹ §67, Act July 13, 1866. 14 Statutes at Large, 171.

Northwestern Distilling Co. vs. Corse.

If the word "attachments" did not apply to the case of an injunction as is conceded, do the words "bail or other securities" apply?

There was a very serious question connected with this originally, and good deal of doubt, at the time, in the minds of the profession, I think, as to the correctness of the decision of Judge McLean, upon the point.¹ The profession was not inclined to acquiesce altogether in that decision, and I recollect that it struck the profession with some surprise. They had taken it for granted that the injunction was not necessarily dissolved; but the more that they reflected upon it, I think, the more they became convinced that, on the whole, the decision was sustainable. It has now been generally acquiesced in and followed in this court, and even if there is a doubt as to its correctness, I should not feel inclined at this time to change the practice unless upon directions from a higher court. The principle of that decision, under that law and under this, is applicable to the particular point. All attachments and all bail or other securities given upon the suit or prosecution shall be and continue in like force, etc. Judge McLean, it is clear, did not think that the term attachment was sufficiently comprehensive to include injunction. The question is, whether if "attachment" did not include injunction, "bail or other securities" did. I do not see upon what principle.

GEO. C. BATES, Esq.—Suppose there had been a hearing on the motion to dissolve the injunction and a hearing on testimony taken and the court had made it final, and the case was then brought here, would the injunction be dissolved?

THE COURT.—I do not see how there could be such a case without a final hearing. There would be a trial *quoad hoc*, and this law requires that it should be removed before trial. The language is "at any time before trial." That is, the trial

¹ McLeod vs. Duncan, 5 McLean, 342.

Campbell vs. Barclay.

must not have commenced for the final disposition of the cause. If it is, it is too late under this law.

I have to treat the injunction as *ipso facto* dissolved by the removal of the case.

See further *Hatch vs. Chicago, R. I. & P. Railroad Co.*, 6 Blatchford, 105.—[Reporter.

ANDREW J. CAMPBELL vs. DANIEL BARCLAY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL,
1869.

This court will not allow parties to be injured or prejudiced by any misunderstanding between their counsel.

Motion to set aside a judgment entered on default, it being alleged that the default was taken and entered in violation of an understanding between counsel.

DRUMMOND, J.—This is the rule that I have always adopted in these cases, that where there is any agreement, understanding, negotiation, or any thing of the sort, as to the disposition of a case, and there is a difference of opinion between the counsel as to what actually took place, that, as it arises from the fact of the negotiations pending between the parties, although there may be a difference of opinion, or misunderstanding, I will not allow the party to be prejudiced by the misunderstanding. Where counsel deal with each other at arm's-length, each standing on his own rights, of course there need be nothing of that sort; but where

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a negotiation is entered into between counsel, and difficulty and misunderstandings arise in consequence of that, I do not allow the party to be prejudiced. If you say that there never was anything of the kind at all; that there never was an agreement or understanding that the declaration should be given to them, and plea furnished by them,—that is another matter. If you say this is made out of whole cloth, that is another matter.

Judgment set aside.

THE IRONSIDES.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MAY,
1869.

IN ADMIRALTY.

1. POSSESSION OF PROPERTY ON FILING OF VOLUNTARY PETITION.—On a voluntary petition, the court has power to take possession of the bankrupt's property pending the publication of notice and election of an assignee.

2. A maritime lien is not divested by the filing a petition in bankruptcy; the assignee takes the property subject to it.

3. MARSHAL AS MESSENGER.—Where the marshal has taken possession as messenger, but without any order of court, his possession is not that of the court in bankruptcy.

4. CONFLICT OF JURISDICTION.—A party having a maritime lien may, even after the filing of a petition in bankruptcy by the owner, seize the vessel under a libel in another district, and the latter court has jurisdiction to hear and determine the lien.

5. In such case the assignee has the right to appear and be heard, and

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the court in bankruptcy should accept the determination of the court in admiralty as to the validity and amount of the lien.

6. ASCERTAINMENT OF LIENS.—The words in section one of the Bankrupt Act, extending jurisdiction “to the ascertainment and liquidation of the liens and other specific claims” upon the bankrupt’s property, apply only to cases where these liens or claims have not been previously determined by other competent tribunals.

This was a libel by Dyer & Paine, of Chicago, for supplies furnished at that place, while the vessel was owned by a person in Cleveland. The owner being, after the date of the furnishing of the supplies, adjudged a bankrupt by the District Court for the Northern District of Ohio, the messenger of that court took possession of the vessel at Chicago for the purpose of taking her to Cleveland; and while she was thus in his possession this libel was filed and the vessel seized. The messenger disputed the right of the admiralty court to proceed, and claimed that the vessel was in the custody of the law, and that the bankrupt court alone had exclusive jurisdiction to settle all maritime liens.

Robert Ræe, on behalf of libellant, contended that the bankrupt court was but a municipal court, having no extra-territorial jurisdiction and its decrees being only effectual within the territory of the United States; that the admiralty court was a court recognized by and belonging to the law of nations, and that the world were parties to her proceedings *in rem*; that both courts existed under the Constitution of the United States, and claimed exclusive jurisdiction; that the act of Congress in reference to bankruptcy was not passed with an intention to oust the admiralty courts of jurisdiction, and it could not be done by implication, the bankrupt court being one of inferior and local jurisdiction, and the admiralty one of superior and universal jurisdiction; that the admiralty court is alone adapted to try maritime matters, especially in cases of collision and suits between foreigners and its own citizens, and can best ascertain what is and what is not a

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maritime lien, and its decrees are respected throughout the family of nations, etc.

Willey & Cary, of Cleveland, for the Messenger.

DRUMMOND, J.—A case has been submitted to the court upon, substantially, an agreed statement of facts, upon which it is claimed, on the part of the defense, that the court has no jurisdiction of the case.

It was a libel filed by Dyer & Payne, as coal and wood merchants of Chicago, for furnishing to the propeller, in that city, on the 13th day of May, 1868, a quantity of coal on the credit of the vessel, the facts being that neither the owner nor master of the propeller had money or credit to purchase the same.

At the time, the propeller was owned by Dwight Scott, a citizen of Ohio. On the 30th of May, 1868, he filed his petition in bankruptcy in the District Court of the United States for the Northern District of Ohio, and on the first of June of that year was duly adjudged a bankrupt by that court. At the time of the seizure under the monition issued in this case, on the 5th of June, 1868, the propeller was in the possession and under the control of the marshal of the Northern District of Ohio, as messenger under the proceedings in bankruptcy, it being claimed that he was entitled to the possession of the propeller under the rules and regulations in bankruptcy in that court and by virtue of the bankrupt law. When the seizure was made by the marshal of this court a stipulation for release was given, protest being made at the time of the seizure.

When the seizure was made by the marshal, and the answer and claims were filed, no assignee had been appointed by the District Court of the United States for the Northern District of Ohio. There is nothing stated in the case from which it can be seen that the marshal of the Northern District of Ohio took possession under any warrant or process

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from the court in bankruptcy, but the inference is, from the foregoing statement, that he took possession, as already intimated, because he claimed that he had a right of possession under the bankruptcy law, by virtue of the petition filed on the 30th day of May, 1868.

The first question to be determined under this state of facts is: What was the position of the marshal of the Northern District of Ohio with reference to the propeller? Was he in any other or different position from that of the owner of the propeller in case proceedings in bankruptcy had not been instituted? In other words, was the propeller in the custody of the law and not liable to seizure or proceedings against her on the part of the admiralty court?

It will be seen from the statement which has been made that no objection is taken on the ground that it is not a case of a proper maritime lien against the propeller, but the objection only arises from the proceedings in bankruptcy in the court in Ohio. It has been decided by the Supreme Court of the United States¹ that where a vessel is in the custody of an officer under a process from a state court it is not liable to seizure by the marshal upon a libel filed, even in the case of a regular maritime lien; that the vessel is in the custody of the law and cannot be seized by the marshal and is not subject to the jurisdiction of the admiralty court in such a case, and this rule would apply if it is plain that the messenger under proceedings in bankruptcy held the vessel in such a way as to make him the custodian of the court, or held the vessel under the process of the court.

From what has been already said I think it will be apparent that this was not the actual position of affairs. It is important under the bankrupt law to determine what is the condition of the property of the bankrupt, in the case of a voluntary proceeding in bankruptcy, between the time of filing

¹Taylor vs. Carryl, 20 Howard, 583.

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the petition and the date of the appointment of the assignee. It is rather a singular omission in the bankrupt law that no distinct provision seems to have been made in the case of voluntary bankrupts for the control and disposition of the property between the date of filing the petition and that of the appointment of the assignee, and the rules established by the Supreme Court do not appear to have made any distinct provision for such a case.

The 11th section of the bankrupt law states what is to be done where a voluntary petition is filed. It declares that the judge, or, "if there be no opposing party," the register, shall "issue a warrant, * * * directed to the marshal of said district," and it proceeds to declare what authority is given to the marshal as messenger, authorizing him forthwith as messenger, to publish notices in such newspapers (as the warrant specifies¹), to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor, and to give such personal or other notice to any persons concerned as the warrant specifies, which notice shall state: that a warrant in bankruptcy has been issued against the estate of the debtor," &c. The warrant provided by the rules, which is form number 6, makes no provision whatever, and gives no authority to the marshal, as messenger, to take possession of the goods of the bankrupt, and the 13th rule established by the Supreme Court in bankruptcy, in the first part of it, seems to contemplate only the case of the appointment of the marshal as messenger in an involuntary proceeding in bankruptcy. The only warrant in bankruptcy that is referred to in the rules in the case of voluntary proceedings is form 6. I recollect a case where an application was made to this court for the appointment of a person

¹"As the marshal shall select, not exceeding two" (Amendment of June 22, 1874).—[Reporter.

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specially to take possession of the property of a bankrupt between the date of the filing of the petition and the appointment of the assignee, and the court made an order appointing a proper person to take charge of the property during that time.

Now the 14th section of the bankrupt law provides that the assignment shall relate back to the commencement of the proceedings in bankruptcy, so that the property shall all vest in the assignee from that time, and therefore, by relation, the assignee is clothed with all the powers of the owner of the property from the date of filing the petition.

In involuntary proceedings a different provision is made. In that case under the 40th section it is declared that the court may issue a warrant to the marshal commanding him to arrest the alleged bankrupt, and also forthwith to take possession provisionally of all the property and effects of the debtor and safely keep the same until the further order of the court, which is called a "warrant of seizure" and is numbered "form No. 59," under which the marshal, as messenger, can take possession of the property of the bankrupt.

It is difficult to account for this difference between the case of a voluntary and involuntary proceeding as to the property of a bankrupt except upon the presumption that it was supposed that in the case of a voluntary petition the bankrupt thereby manifesting his willingness that all his property might go for the benefit of the creditors, that it would remain subject to the order of the court until an assignee in bankruptcy was appointed, and therefore no special clause was inserted in the law for such a contingency. However this may be, such seems to be the fact, and we have to take the law as it is.

From what has already been stated it is apparent that it is competent for the court in bankruptcy, under certain circumstances, to take possession of the property where a voluntary petition is filed, and it is possible that if that had been done by a proper order or warrant of the court in this case, that

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the rule might have been different from what it is under the actual state of facts; because I think it is inferable that the marshal merely took possession of this property as the representative of the creditors of the bankrupt, without any other or different power or right from that with which the bankrupt himself would have been clothed if no proceedings in bankruptcy had been instituted.

The question is, what was the intention of the bankrupt law as to the disposition of the bankrupt's property and as to the liens which might exist against it at the time that the petition was filed in a voluntary proceeding. Was it the intention of the bankrupt law to divest and dissolve all liens, and proceedings to enforce a lien in the admiralty court?

Under the 14th section the law manifests its intention clearly to dissolve all process of attachment,—all *mesne* process of attachment—on the property of the bankrupt, and declares that all such process shall be dissolved if the attachment was made within four months next preceding the commencement of the proceedings in bankruptcy, but it has said nothing about maritime liens.

What is a maritime lien? It is what is technically termed a *jus in re*; that is to say, that the person in whose favor the lien exists can pursue the *res* and the latter remains subject to the right of the claim until it is finally satisfied, provided it be enforced in conformity with the rules of an admiralty court. In other words, the *res*, in whosoever hands it may come, is subject to the lien which exists against it.

Was it the intention of the bankrupt law to divest this lien? Is it fairly within the meaning of the 14th section, in relation to attachments? I am inclined to think that it is not. As already said, the lien exists against the *res* independent of the process. In ordinary cases of attachment, it is the attachment that operates as the lien against the property, and the bankrupt law intends that in all such cases the attachment should be dissolved, if commenced within a certain time before the proceedings in bankruptcy. The proceedings in

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bankruptcy would not divest a mortgage lien. They would not divest any valid subsisting lien not named in the bankrupt law, but which could be enforced in conformity with law, and I think that it was not the intention of the bankrupt law to interfere with any valid subsisting lien except those specifically named, but that such liens should be enforced in the usual way. Therefore I think that it was not the purpose of the law to divest any valid subsisting maritime lien which might exist against the property of the bankrupt at the time that the petition was filed, but that it was the intention of the law that the assignee should take the property subject to that lien.

Take the case of a valid subsisting mortgage against the property of a bankrupt, good by virtue of the law of the state where the property exists. There could be no question that proceedings in bankruptcy would not divest that lien; the mortgagee would have a right to enforce the mortgage in a legal and proper manner, notwithstanding proceedings in bankruptcy. So here, where there is a valid maritime lien against the property of the bankrupt at the time of the commencement of the proceedings in bankruptcy, it can be enforced according to the rules of the admiralty court.

The only question is, in what tribunal—a court of bankruptcy or a court in admiralty—it is to be ascertained whether a maritime lien exists.

There really cannot be any conflict of jurisdiction between the court in Ohio and the court here, as there might be between a federal and a state court, but the two courts of the United States necessarily proceed in harmony with each other.

The first section of the bankrupt law declares that "the jurisdiction hereby conferred shall extend" among other things, "to the ascertainment and liquidation of the liens and other specific claims" upon the property of the bankrupt, and it seems to me that the court of admiralty where the proceedings have been commenced in the usual and regular way, and where, in conformity with the law and practice of the court,

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the case can proceed to proofs, hearing, and decree, is the proper forum to determine whether there is a valid maritime lien.

It is true that the District Court of the United States for the Northern District of Ohio, is clothed with the same admiralty power as this court, but it is clear that it may become a very serious question whether there is a lien in a given case, and if the bankruptcy court is to ascertain whether there is a maritime lien upon the property belonging to a bankrupt at the time of filing the petition, it would become the duty of that court to make a great number of collateral issues. For instance, it might have to direct proceedings to be commenced in a regular way in order to determine whether there was a valid maritime lien. Undoubtedly where before a person took possession of the property of a bankrupt under the proceedings in bankruptcy there were proceedings commenced under a state law by which state law it was claimed that there was a lien, it would be proper for the court in bankruptcy to allow the suit and prosecution in the state court to proceed in order that it might be ascertained whether or not there was a valid lien upon the property under the state law. So in this case the court in bankruptcy would be regulated by the adjudication of this court upon the point whether or not there was a valid maritime lien, and would direct the assignee to proceed in conformity with the decree of this court, so that there is no conflict between the two courts. If that court had actually taken possession by virtue of its officer of the property of the bankrupt it might be improper for this court to interfere, but until that is done I think the property of the bankrupt remains subject to all the liens which existed at the time of the filing of the petition, and they can be enforced. So when the first section of the law uses the words "to the ascertainment and liquidation of the liens and other specific claims thereon," it means where those liens or claims have not been already determined and ascertained by other competent tribunals; where, in other words, the question natu-

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ally arises in the course of the proceedings in bankruptcy, there the court is to determine whether or not there is a lien, and according as it may determine, decide upon its liquidation, or otherwise.

For these reasons, I think that the objection taken by the defense must be overruled, and the jurisdiction of the court in admiralty maintained. Of course it will be competent for the messenger, or the assignee, if one has since been appointed, to appear in this case as the representative of the creditors and to show, if it can be done, that there is no valid subsisting maritime lien upon this property, but, if there is, I hold it to be the duty of this court to maintain the libellants in their right to that lien.

There is an argument *ab inconvenienti* which is perhaps not entirely destitute of force. These supplies were furnished to the propeller in this port. All the evidence in relation to the claim and the necessity of the supplies furnished for the use of the propeller exist here. If the question were to be determined by the District Court of Ohio, of course it would be necessary that proof should be sent there. That involves additional labor and expense upon the libellant, which, in the absence of any clear provision of law rendering it compulsory I do not feel inclined to subject him to.

The jurisdiction of this court will be sustained.

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Held, that, under these circumstances, the bank was not bound to transfer the stock to his assignee. *Id.*

Held, also, that the lien of the bank on the stock was not defeated by the adjudication of bankruptcy; that the stock should be sold, and the proceeds applied to the payment of the debt due the bank so

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far as the same would go; and that, for the residue of its debt, the bank might prove its claim, with a view to a dividend of the assets of the bankrupt estate. *Id.*

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Held, that the transaction as to the check on the deposit was a mere adjustment of mutual debts, and not a fraudulent preference within the meaning of the Bankrupt Law. *Hough vs. First National Bank of Ft. Wayne*, 349.
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his debt and have his dividend in like manner as if no preference had been given. But he forfeits all right to prove his claim or have a dividend, if he fails voluntarily to deliver up what he has obtained under such preference, or only delivers it up at the end of a law-suit. *Id.*

25. **FRAUDULENT MORTGAGE.**—More than four months, and within six months, before a petition for adjudication of bankruptcy was filed, the bankrupt mortgaged all his property to a creditor to secure *bona fide* debts and liabilities.

Held, that, in order to entitle the assignee to recover from the mortgagee the property thus mortgaged, it must be proved that, at the time of the execution of the mortgage, the mortgagor was insolvent, or in contemplation of insolvency or bankruptcy; that the mortgagee had then reasonable cause to believe that such was the fact; and that such mortgage was made with a view to prevent the mortgaged property from coming to the mortgagor's assignee in bankruptcy, or to prevent the same from being distributed under the Bankrupt Act, or to defeat the object of, or delay, hinder, impair, or impede the operation of, the Bankrupt Act, or to evade some of its provisions. The mortgage can not be avoided simply because it gave a preference to the mortgage. *Sidener vs. Klier*, 391.

26. **RIGHTS OF EXECUTION CREDITOR—CANNOT SELL BANKRUPT'S PROPERTY.**—An execution creditor, without leave of the bankrupt court, has no right to sell property under his writ after the filing of a petition in bankruptcy against the debtor; and a sale so made passes no title. *The Skylark*, 388.

27. **LIEN—HOW ASSERTED.**—The creditor may assert his lien in the bankrupt court, but cannot control the property as against the assignee. *Id.*

28. **CREDITOR CANNOT SELL SECURITIES—COURT WILL RESTRAIN.**—A creditor holding security has not an absolute power over his securities, and the court will, on application of the assignee, restrain the creditor from selling them. *Id.*

29. **DISTRIBUTION OF ASSETS—PARTNERSHIP DEBT.**—The partnership debts of the bankrupts far exceeded the partnership property, but the individual assets of the partner D. exceeded his individual debts. D. had been a member of another firm of B. & D. which owed the E. N. Bank some \$16,000. The bank proved this debt under the proceeding in bankruptcy of D. & Co., and insisted that the surplus of the assets of D., after satisfying his individual debts, should be added to the general assets of the firm of D. & Co.; and that out of the fund thus composed of the assets of both D. and of the firm, the bank should take a dividend equally with the creditors of the firm.

Held, that the mode of distribution thus claimed by the bank could not be allowed. *In re Robert K. Dunkerson & Co.*, 323.

Held, that the proper mode of distribution in this case is as follows:

1. That the individual assets of D. must first go to pay his individual debts in full.

BANKRUPTCY—Continued.

2. That the joint assets of D. & Co. must be distributed *pro rata* to the creditors only to whom the firm was jointly liable.

3. That the individual assets of D., after satisfying in full his individual debts, should be distributed, *pro rata*, among all the creditors who have proved their claims in the proceeding, and to whom D., at the time of the filing of the petition in bankruptcy, was liable, either as a member of the firm of D. & Co., or of any other firm. *Id.*

30. **PARTNERSHIP—INDIVIDUAL DEBTS—DISTRIBUTION.**—As a general rule, partnership property must first go to satisfy partnership debts, in preference to separate debts due by a partner. *In re Wiley*, 214.

31. **PROPERTY TRANSFERRED TO PARTNER.**—When property once belonging to a partnership, has, by a *bona fide* contract, ceased to be partnership property, and became the separate property of one of the partners, who afterwards becomes a bankrupt, the partnership creditors are not entitled to any preference over the bankrupt's individual creditors, in relation to such property. *Id.*

Quare, Whether in such a case, the individual creditors of the bankrupt are not entitled to the preference? *Id.*

32. **DISTRIBUTION OF ASSETS—PARTNERSHIP AND INDIVIDUAL DEBTS.**—The Bank of Kentucky held drafts drawn by Given, Brown & Co. on R. K. Dunkerson & Co. and accepted by the latter. R. K. Dunkerson was a partner in both the firms. Both were adjudged bankrupts. Dunkerson had separate assets more than enough to pay his individual debts. The bank proved its debt both against Dunkerson individually and against the firm of Dunkerson & Co. In the distribution of assets, the bank claimed the right to a *pro rata* dividend, out of the separate assets of Dunkerson, equally with his individual creditors, as well as a right to a dividend in the joint assets of the firm. *Held*, that the claim of the bank on the separate assets of Dunkerson's individual estate could not be allowed. *In re R. K. Dunkerson & Co.*, 277.

33. **OMISSION FROM SCHEDULE—DISCHARGE.**—Where a bankrupt omitted to state in his schedule the amount of money in the hands of a receiver appointed by a state court in a suit between him and his co-partner in relation to partnership property, but stated that the partnership assets would not more than pay the expense of their litigation, and that he was not able to state their exact amount: *Held*, that the omission was no ground for refusing a discharge; and that an affidavit to the truth of the schedule was not *prima facie* perjury. *In re Shoemaker*, 245.

34. **FRAUDULENT TRANSFER.**—A suit was brought by a partner against his co-partner in a state court, charging waste, and praying the appointment of a receiver. A receiver was appointed, and took control of the partnership assets. Soon after, the plaintiff in that suit was adjudged a bankrupt on his own petition. *Held*, that the proceedings in the

BANKRUPTCY—Continued.

state court did not amount to a fraudulent transfer by the bankrupt of his property, so as to preclude him from his certificate of discharge. *Id.*

35. **OPPOSITION TO DISCHARGE** of a bankrupt must be in writing, and must disclose the name of the opposing creditor or creditors. *Id.*

36. **WITHHOLDING DISCHARGE**.—A discharge will not be withheld from a bankrupt for not scheduling property in which he did not at the time know that he had a substantial interest. There must be an intention to conceal the property. *In re Parker*, 501.

37. **DISCHARGE FROM ARREST**.—Where a bankrupt is under arrest under process from a state court, he should make application to that court, before coming into the court of bankruptcy to obtain his release. This practice is less likely to produce conflict of jurisdiction. *In re O'Mara*, 506.

BILL OF LADING.

1. **FREIGHT BILL**,—is a contract; and its effect cannot be varied by parol evidence. *Dixon vs. Col. & Ind. R. R. Co.*, 187.

2. **CONSTRUCTION**.—A freight bill ending "acc't Heary Dixon," and signed "W. T. Noell & Co., Agents," may be construed as made to Heary Dixon, he being in fact the consignee. *Id.*

3. The words "I. & C. Central R. R.," cannot, without an allegation of misnomer, or offer to prove the identity, be taken to mean the Columbus and Indianapolis Railway Co., in a contract not purporting to be made by such company. *Id.*

4. Where a freight bill is signed "W. T. Noell & Co., Agents," not appearing on its face to be the contract of a railroad company, parol evidence is not admissible to show that it is the contract of the company. *Id.*

BILLS, NOTES AND CHECKS.—See BANKRUPTCY, §2.

1. **JURISDICTION—CITIZENSHIP**.—The defendant executed a note to S. Strous or order. Strous indorsed it in blank, and then re-delivered it to the defendant, who thereupon delivered it to the plaintiffs. The declaration averred that it was an accommodation note, and that Strous never had any interest in it.

Held, that, under the 11th section of the Judiciary Act, the court has no jurisdiction of the case unless it appear by an averment in the declaration that Strous, as well as the plaintiffs, is a citizen of a state other than Indiana. But the rule is otherwise as to foreign bills of exchange, bills and notes payable to bearer, and suits by indorsees against their immediate indorsers. *Noell vs. Mitchell*, 348.

2. **NOTE PAYABLE IN EXCHANGE**.—The fact that a note is made payable in exchange does not prevent its being a promissory note, even though the rate of exchange is not specified. *Bradley vs. Lill*, 473.

3. **COMPUTATION OF EXCHANGE**.—The exchange, like interest, is an incident to the principal sum, and the rate is subject to proof; but when the proof is in, then the amount is a matter of computation. *Id.*

BILLS, NOTES AND CHECKS—Continued.

4. **INTEREST.**—The Illinois statute of February 12, 1857, does not apply to a contract where no rate of interest is fixed by agreement. *Id.*
 5. **LAW MERCHANT NOT BINDING IN INDIANA—RIGHTS OF INDORSEE.**—By the law of Indiana, ordinary promissory notes are not governed by the law merchant. But, as a general rule, the indorsee, having first used due diligence by suit to collect such notes from the maker, has his recourse on the indorser. *Mott vs. Wright*, 53.
 6. **INDORSEMENT GOVERNED BY *Lex Loci*.**—The indorsement of a note is a new, distinct contract; and such contract is governed by the law of the place where it is made, without regard to the law of the place where the note was made. *Id.*
 7. **LEX LOCI CONTRACTUS—DELIVERY.**—The contract of indorsement includes two essential things: the writing itself, and the delivery of it to the indorsee. And if the indorsement is written in one state, and delivered to the assignee in another, the law of the latter state controls the contract. *Id.*
 8. **A indorsed notes in Indiana, and sent them by mail to B, the indorsee, in New York, where B received them.** *Held*, that the indorsement was governed by the law of New York. *Id.*
 9. **ASSIGNMENT OF PROMISSORY NOTE—STATUTE OF ANN.**—At common law, promissory notes could not be assigned so as to vest the legal title in the assignee. The statute of 3 and 4 Ann, which is not in force in Indiana except as to "notes payable to order or bearer in a bank in this state," altered the common law rule. *Swiggott vs. Seymour*, 230.
 10. **INDORSEMENT—LAW MERCHANT—DILIGENCE.**—In this state, the negotiation of promissory notes is governed by Indiana statutes. Under these statutes, notes payable to order or bearer in a bank in this state, are governed by the law merchant. Other notes are not. And as to the latter, as a general rule, the indorsee must employ due diligence by legal proceedings to collect the note from the maker before he can maintain an action against the indorser. But, to this general rule, there are several exceptions. *Id.*
 11. **INDORSEE OF SECURED NOTE.**—A note was indorsed in the state of Indiana to a citizen of the state of Ohio, and was secured by a mortgage, executed by the maker to the indorser, on lands in the state of Wisconsin. The maker was wholly destitute of property, subject to execution. *Held*, that the indorsee might maintain an action without first suing the maker or foreclosing the mortgage. *Id.*
- BONA FIDE PURCHASER.**—See RECORDING, 2, 3, 6—REAL ESTATE, 12.
- BREACH OF COVENANT.**—See PLEADING, 30.
- BURDEN OF PROOF.**—See EVIDENCE, 3-5.
- BY-LAW.**—See NATIONAL BANK, 1, 3, 4.
- CANAL BOAT.**—See ADMIRALTY, 18.
- CARRIER.**—See COMMON CARRIER.

CHANCERY.—*See* PRACTICE, 2, 6, 9.

1. **WANT OF EQUITY.**—Where a bill charged that the complainants are the legal owners of lands of which the defendants have forcibly taken possession under a false and fictitious claim of title, but giving no intimation of the nature of the fictitious title, the bill is bad for want of equity on its face. The remedy in such a case is an action at law. *Speigle vs. Meredith*, 120.
2. **BILL MUST ALLEGE JURISDICTIONAL FACTS.**—A bill in equity in this court must distinctly state the citizenship of every necessary party to it, and show that the complainants and defendants are citizens of different states. And if it fails to do this, it will be bad on demurrer; and any decree on it in favor of the complainants would be liable to reversal in the Supreme Court. No appearance, demurrer, or answer to such a bill will waive this omission in it. *Id.*
3. **PARTIES.**—This court will not make a decree the execution of which would affect the right of a party not before it, or throw a cloud upon his title. *Young vs. Cushing*, 456.
4. If such absent party is a necessary party for a final decree, the bill should be dismissed without prejudice. *Id.*
5. **STALE DEMAND.**—Courts of equity are reluctant to sustain a demurrer to a bill on the ground of staleness alone, unless it is such that the delay would bar an action at law on the same claim, or unless there is a strong analogy between the case in equity, and a case at law on which a statute of limitation would operate. *Putnam vs. New Albany*, 365.

CHARTER. *See* CORPORATION, 13, 14.

CHATTEL MORTGAGE.

1. **EFFECT OF FILING PETITION IN BANKRUPTCY.** The filing by the mortgagor of a voluntary petition in bankruptcy is "an attempt to sell," within the meaning of the usual clause in chattel mortgages, *Moore vs. Young*, 128.
2. **CHATTEL MORTGAGE—WHEN FRAUDULENT.**—A chattel mortgage on a stock of goods can only be *prima facie* fraudulent, as being out of the usual and ordinary course of business, and its validity may be established by proof. *Id.*
3. **RECORDING.**—In Indiana an unrecorded chattel mortgage, where the property is not delivered to the mortgagee, is absolutely void, as against the assignee in bankruptcy of the mortgagor. *Id.*

CITIES.—*See* NEGLIGENCE, 4, 5, 7, 8.

CITIZENSHIP.—*See* JURISDICTION, 3, 5, 9—CORPORATION, 19.

CODE.—*See* PLEADING, 40; PRACTICE, 5.

COLLISION.—*See* ADMIRALTY, 18, 20, 24-30.

COMMERCIAL PAPER.—*See* BILLS, NOTES, AND CHECKS.

COMMON CARRIER.

1. **INSURER OF FREIGHT MONEY.**—A temporary retardation, and subse-

COMMON CARRIER—Continued.

quent sale of the cargo by the owner, does not constitute an abandonment, nor deprive the carrier of his right to the freight money; he therefore, cannot recover from the insurer of the freight money. *Murray vs. Aetna Ins. Co.*, 417.

2. **DUTY TO CARRY TO DESTINATION.**—Where a vessel takes a cargo late in the season, for transportation around the Lakes, and is laid up by stress of weather, it is her duty to complete the voyage in the spring, if practicable, and carry the cargo to its destination. *Id.*
3. **FREIGHT MONEY—WHEN EARNED.**—If a cargo is necessarily unloaded at an intermediate point, and the owner sells it there, though the vessel might have carried it in the spring, the carrier has earned his freight. *Id.*
4. **TRANSPORTATION BEYOND LINE.**—Where a railroad company received goods for transportation to a point beyond their own terminus, and the plaintiff alleges that they undertook to carry the whole distance by rail, the burden is upon him to prove such undertaking. *Dixon vs. Col. & Ind. R. R. Co.*, 137.
5. **LOSS BEYOND CARRIER'S LINE.**—In such case the burden is not upon the carrier to account for the loss, if he has delivered at his own terminus to a proper person. *Id.*
6. The owner of property shipped over connecting railroads can, on failure to deliver, recover of an intermediate road into whose custody and exclusive control it had come. *Knowles vs. Pittsburg, Ft. Wayne & Chicago R. R.*, 466.

COMMON INFORMER.—See CRIMINAL LAW, 20.

1. **THEIR RIGHTS.**—The information must be given to some government official who has the power and duty to act thereupon, and if several causes exist information of any one of them is sufficient. *United States vs. Funkhouser & Co.*, 176.
2. The information must be a plain statement in writing of some one substantial cause, matter, or thing, whereby a fine, penalty or forfeiture shall have been incurred. And it should be sworn to, if required by the officer. *Id.*
3. A party claiming to share in the judgment must be the first informer, and his information must be substantially true, and capable of proof. *Id.*
4. Whether, under any circumstances, a special agent of the revenue is entitled to claim as an informer,—*quære*. *Id.*
5. The claim of an informer can only date from the time when he actually gave the proper formal information—not when he ascertained the facts. *Id.*
6. The share of the informer must be taken from the net, not the gross, proceeds. *Id.*

CONFISCATION.—See EVIDENCE.**CONFLICT OF JURISDICTION.—See JURISDICTION, 6; BANKRUPTCY, 11.**

CONFLICT OF JURISDICTION—Continued.

1. **RECEIVER.**—A receiver cannot be called on to account before any court but that which appointed him. *Conkling vs. Butler*, 22.
2. Where a state court, on a petition under the Indiana statutes to dissolve a corporation, has taken jurisdiction, thereby decreed a dissolution of the corporation, appointed a receiver, and taken the custody of the assets, no national court can take jurisdiction of a bill to call on the receiver to render an account, and to collect the assets under the direction of the United States Court. *Id.*
3. **MARITIME LIEN.**—A party having a maritime lien may, even after the filing of a petition in bankruptcy by the owner, seize the vessel under a libel in another district, and the latter court has jurisdiction to hear and determine the lien. *The Ironsides*, 518.
4. In such case the assignee has the right to appear and be heard, and the court in bankruptcy should accept the determination of the court in admiralty as to the validity and amount of the lien. *Id.*

CONFLICT OF LAWS.—See CONSTRUCTION.

1. **AUTHORITY OF STATE DECISIONS.**—On a commercial question this court is not bound to follow the decisions of the State Supreme Court, especially when contrary to the opinion of the mercantile community and the general opinion of the profession. *Case of Lowe vs. Bliss*, 24 Illinois, 168, disapproved. *Bradley vs. Lill*, 473.
2. In the construction of the charter of a city the federal courts are bound by the decision of the Supreme Court of the state. *Goodrich vs. City of Chicago*, 18.

CONSIDERATION.—See CONTRACTS.**CONSTITUTIONAL LAW.**

1. **DECLARATORY LAWS,**—as such, are unconstitutional. They may operate as future rules on subsequent transactions; but, as constructions of prior laws, they are utterly void. The state legislature has no power to construe a statute previously enacted—such construction, as to acts done, is solely for the judiciary. *Union Iron-Or. vs. Pierce*, 327.
2. **REPUGNANT STATUTES.**—When two statutes of different states are repugnant, the latter repeals the former to the extent of such repugnancy. *Id.*
3. **REPEAL.—EFFECT ON PENDING SUITS.**—Actions on statutes in their nature penal, pending at the time of the repeal of such statutes, cannot be further prosecuted after such repeal. *Id.*
4. **WHEN LEGISLATURE CANNOT ALTER CHARTER.**—Under the provisions of the National Constitution, prohibiting the states from making any law impairing the obligation of contracts, and in cases not falling within the foregoing rules, no fundamental change, even though authorized by subsequent legislation, can be made in the charter of a private pecuniary corporation without the consent of all the stock.

CONSTITUTIONAL LAW—*Continued.*

holders, unless the legislature has provided otherwise in the charter. *Mowery vs. Ind. & Cia. R. R. Co.*, 78.

CONSTRUCTION.—*See* CORPORATION, 1-8, 21—CONSTITUTIONAL LAW, 1, 2-

1. In the construction of the charter of a city, the federal courts are bound by the decision of the Supreme Court of the state. *Goodrich vs. City of Chicago*, 18.
2. The 91st section of the Internal Revenue Act of March 3, 1865, must be so construed as to create a penalty of three hundred dollars for every violation of it. *United States vs. Thomasson*, 99.
3. Penal statutes not authorizing indictments are not within the rule of criminal law, that a man is not punishable unless he has been guilty both of a criminal act or omission and a criminal or unlawful intent. *Id.*
4. FREIGHT BILL,—is a contract; and its effect cannot be varied by parol evidence. *Dixon vs. Col. & Ind. R. R. Co.*, 137.
5. CONSTRUCTION.—A Freight bill ending "acc't Henry Dixon," and signed "W. T. Noell & Co., Agents," may be construed as made to Henry Dixon, he being in fact the consignee. *Id.*
6. The words "I. & C. Central R. R.," cannot, without an allegation of misnomer, or offer to prove the identity, be taken to mean the Columbus and Indianapolis Railway Co., in a contract not purporting to be made by such company. *Id.*
7. INTERPRETATION OF CONTRACT.—A, B and C were the owners of a tract of land. They entered into a written agreement with J, in which it was stipulated that they sold him an undivided half of the land for \$5,299.40, to be paid in four years; that J should pay half the taxes on the land; that he should subdivide and sell it in parcels; that he should deliver to A, B and C the proceeds of said sales in payment of said \$5,299.40 till the same was fully paid; and that afterwards the proceeds of such sales should go, one-half to J and the other to A, B and C.
Held, that till J had delivered over to A, B and C double the amount of his said debt of \$5,299.40, he could not claim a division with them of the proceeds of subsequent sales. *Buckingham vs. Jackson*, 295.
8. STATUTE OF FRAUDS—AUTHORITY TO SELL REAL ESTATE.—Authority to an agent to sell real estate must be clear and distinct, of such a character that a fair and candid person must see without hesitation that the authority was given. *Bosseau vs. O'Brien*, 395.
9. An answer to a letter from a real estate agent asking for authority to sell lands, "I will sell" on terms specified, does not confer the authority on the agent to make a contract of sale. *Id.*
10. Correspondence between the real estate agent and the owner, concerning the lands and the price and the terms of sale, do not constitute authority to the agent to make a contract of sale, even on the terms specified by the owner. *Id.*

CONSTRUCTION—Continued.

11. **CONSTRUCTION OF AUTHORITY.**—An authority to sell must be strictly construed, and the purchaser must show that the contract complies fully and entirely with the authority. *Id.*
12. **POWER.**—A naked power or trust must be strictly construed. *Speigle vs. Meredith*, 120.

CONTEMPT.—*See* PRACTICE, 10-18.**CONTRACTS.**—*See* CONSTRUCTION, 8-11.

1. Where A held a claim against B and C, a promise by B to A that if he, A, would sue C, obtain judgment and levy on his property, he, B, would bid the amount of the claim, is a valid consideration upon which an action will lie by A against B for refusing so to bid. *Hop-pock vs. Wicker*, 469.
2. **CLAIM NEED NOT BE A VALID ONE.**—It is not necessary that the claim be a legal or valid claim against B. It is sufficient that he desired it to be prosecuted against C, and not against himself. *Id.*
3. **MEASURE OF DAMAGES.**—*It seems*, that full damages could not be recovered unless the debt was lost in consequence of such failure to bid, or it appeared that C did not have other property from which the judgment could be made. *Id.*

CONTRIBUTORY NEGLIGENCE.—*See* NEGLIGENCE.**CONVEYANCE.**—*See* RECORDING, 5, 7.**CORPORATION.**—*See* RECEIVER, 2, 5—NATIONAL BANKS—PRACTICE, 16.

1. **CORPORATE POWERS.**—A corporation has only such powers as its charter gives, either expressly or as incident to its existence. *Pul-lan vs. Cincinnati & Chicago Air-Line R. R. Co.*, 85.
2. **POWER TO MORTGAGE FRANCHISES.**—No corporation can mortgage its franchises without clear legislative authority to do so. And au-thority to a railroad company to mortgage its "road, income, and and other property," does not authorize a mortgage of its fran-chises. *Id.*
3. Legislative authority to mortgage includes the power to make a deed of trust in the nature of a mortgage. *Id.*
4. A trust deed may be void in part and valid in part. *Id.*
5. **ROLLING STOCK—WHEN INCLUDED IN MORTGAGE.**—A mortgage by a railroad company of "all the present and future-to-be-acquired prop-erty of the company, including the right of way and land occupied, and all rails, and other materials used therein or procured therefor," includes the rolling stock of the road. *Id.*
6. **PARTICULAR DESCRIPTION CONTROLS GENERAL TERMS.**—Where a mortgage, in describing property, employs at first general terms, and afterwards proceeds to describe particularly each thing mortgaged, the latter will control the former, if there be a repugnancy. *Id.*
7. **SPECIFICATION—WHEN EXCLUSIVE.**—In a deed, specification gen-erally excludes things not specified. But the omission to specify

CORPORATION—Continued.

- a thing, without which the things specified would be of no value, does not exclude it. *Id.*
8. A railroad company having a general power to mortgage its road, may mortgage any part of it. *Id.*
9. PARTIES.—Purchasers *pendente lite* are not necessary parties to a bill in chancery. The judgment binds them, though they are not brought before the court. *Id.*
10. INJUNCTION—WHEN GRANTED.—A temporary injunction will be decreed where without it great injury may happen to the complainant, and no injury can result from it to the defendant. *Id.*
11. APPOINTMENT OF RECEIVER—DISCRETIONARY.—The appointment of a receiver is generally within the sound discretion of the court. But it is a power only to be exercised in strong cases. In no case of a mortgage ought a receiver to be appointed if it is clear that on a foreclosure the mortgaged property will bring enough money to pay the debt, interest, and costs. *Id.*
12. CORPORATION—WHEN BOUND BY ACTS OF MAJORITY.—It is a general rule, that the acts of a majority of a body politic bind the whole corporation, when confined to its ordinary transactions, and consistent with the original objects of its formation. *Mowery vs. Ind. & Cin. R. R. Co.*, 78.
13. CHANGES IN CHARTER.—When, at the time of subscribing stock in a corporation, there are existing laws by which the charter of the body politic may be fundamentally changed, such subscription must be presumed to have been made with a view to such laws, and to changes which may possibly be made conformably to them. And in such case a majority of the stockholders may adopt such changes against the will of a minority. *Id.*
14. WHEN LEGISLATURE CANNOT ALTER CHARTER.—Under the provisions of the National Constitution, prohibiting the states from making any law impairing the obligation of contracts, and in cases not falling within the foregoing rules, no fundamental change, even though authorized by subsequent legislation, can be made in the charter of a private pecuniary corporation without the consent of all the stockholders, unless the legislature has provided otherwise in the charter. *Id.*
15. DIRECTOR—WHEN ESTOPPED BY NOT OBJECTING.—If a member of a Board of Directors of a corporation be present at the adoption of a resolution, and aware of what is being done, and makes no opposition to its adoption, he must be presumed to have assented to it. But if such proceeding be merely preliminary to a decision by a subsequent vote of the stockholders on the consolidation of the corporation with another corporation, which can only be ultimately decided by the vote of all the stockholders, and not of the board of directors, such consent so given by a member of the board of directors, who is also a

CORPORATION—Continued.

- stockholder, does not estop him from afterwards objecting to the consolidation. *Id.*
16. **CONSOLIDATION OF RAILROAD COMPANIES—EVERY STOCKHOLDER MUST CONSENT.**—To effect a consolidation of railroad companies subsisting under special charters not providing therefor, the consent of every stockholder must be given; and any one dissenting stockholder is entitled to an injunction against such consolidation. *Id.*
17. **JURISDICTION.**—In a suit against a corporation in the United States Circuit Court for the state, by a citizen of another state, service of process within the state upon a joint defendant, a citizen of a third state, gives the court jurisdiction over him. *Id.*
18. **CORPORATIONS—WHEN MAY SUE IN FEDERAL COURTS.**—A corporation which has a legal existence in any one state can sue in the federal courts of any other state. It is not necessary that it be a corporation created by the laws of that state. *National Park Bank vs. Nichols*, 815.
19. **CITIZENSHIP OF CORPORATORS.**—It is a presumption—which the courts will not allow to be rebutted—that if a corporation has a legal existence in a state, its corporators are citizens of the same state. *Id.*
20. **INDIVIDUAL LIABILITY OF CORPORATORS.**—When the charter of a corporation provides that where its officers shall neglect to make and publish certain reports required, they shall be individually liable for all corporation debts contracted while they are officers or stockholders; and when, while they were such, they were guilty of such neglect, and in the meantime the corporation became indebted to the plaintiff by note,—*Held*, that he might maintain an action of debt therefor against such delinquent officers. *Union Iron Co. vs. Pierce*, 827.
21. **REPORTS OF OFFICERS.**—Where the charter of a corporation required its officers annually, between the first and 20th of January, to make and publish a certain report,—*Held*, that a company incorporated in May, 1867, was bound to make and publish such report in the following January. *Id.*

COUNTERFEITING.—*See* CRIMINAL LAW, 18, 19.

COVENANT.—*See* PLEADING, 30.

CRIMINAL LAW.

1. **VIOLATION OF REVENUE LAW.**—No action of debt will lie on the 78d section of the Internal Revenue Law of June 30, 1864. The prosecution must be by indictment. *United States vs. Morin*, 93.
2. **FORM OF PROSECUTION.**—When a statute renders an offense punishable by imprisonment or fine, or both, the district attorney cannot waive the imprisonment, and sue in debt for the fine. *Id.*
3. **Quere**, Whether debt will lie on a penal statute which does not fix the amount of the penalty. *Id.*

CRIMINAL LAW—Continued.

4. **INDICTMENT UNDER REVENUE LAWS—DEBT.**—Under the internal revenue laws, when the punishment prescribed is a pecuniary penalty or fine only, and the act fixes the exact amount of it, the action of debt will lie to recover it. *United States vs. Ebner*, 117.
5. Where the punishment provided is a fine only, and the amount of it is not fixed, but left to the discretion of the court, the prosecution for it must be by indictment. *Id.*
6. In all cases in which the law provides that imprisonment either may or must be any part of the punishment, the prosecution must be by indictment. *Id.*
7. **VIOLATION OF REVENUE LAW BY PARTNER.**—Every partner is civilly liable for violations of the revenue law by his co-partners whether he knew of, or consented to, such violations, or not. *United States vs. Thomasson*, 99.
8. The 91st section of the Internal Revenue Act of March 3, 1865, must be so construed as to create a penalty of three hundred dollars for every violation of it. *Id.*
9. Penal statutes not authorizing indictments are not within the rule of criminal law, that a man is not punishable unless he has been guilty both of a criminal act or omission and a criminal or unlawful intent. *Id.*
10. **PARTICULARITY IN INFORMATION.**—An information under the Internal Revenue Law claiming a forfeiture of a distillery, and things connected with it, for a violation of that law, must describe with reasonable certainty the things on which a judgment of forfeiture is asked. It is not sufficient to describe them as "all the boilers, stills, and other vessels used in the distillation of spirits, and all the distilled spirits—being about twelve barrels—now in the distillery owned by Samuel W. Walts." *United States vs. One Distillery*, 26.
11. **NEED NOT NEGATIVE A PROVISIO.**—A pleading on a statute is not required to negative an exception in a proviso to it. *Id.*
12. An information of this kind must aver that the property sought to be adjudged forfeited was used in the illicit distillation charged, or (being spirit) was the product of such distillation. *Id.*
13. **MISJOINDER OF COUNTS.**—Counts for conspiracy cannot be joined with counts for murder. *United States vs. Scott*, 29.
14. In what cases an indictment will be sufficient, which charges the crime in the terms of the statute creating it. *Id.*
15. **DEFECTIVE COUNTS.**—Requisites of a good indictment for murder under an act of Congress punishing opposition to the enrollment of the national forces. *Id.*
16. In the national courts there can be no indictment unless some act of Congress authorizes it. *Id.*
17. **INDICTMENT.**—When an offense is prohibited by several statutes, it is usual to conclude the indictment *contra formam statutorum*. But a

CRIMINAL LAW—*Continued.*

conclusion *contra formam statuti* in such a case will not be sufficient to support a motion in arrest of judgment. So, a conclusion in the plural where there is but one prohibitory statute, is not ground for motion in arrest of judgment. *United States vs. Trout*, 105.

18. **FORGING TREASURY NOTES.**—An indictment for forging treasury notes need not in terms give them that name. The court will determine what they are by the copies of them set out in the indictment. *Id.*
19. In an indictment for forging a treasury note, it is not necessary to aver that it was made in the resemblance of the genuine notes. *Id.*
20. **PARDON REMITS MOIETY OF INFORMER.**—Judgment for a penalty under the revenue laws was rendered against T; at the same time it was adjudged that B was entitled to a moiety of the judgment as the first informer. Afterward the President, by a pardon, remitted the whole penalty.

Held, that the pardon operated to remit the moiety adjudged to the informer, as well as to discharge the portion coming to the United States. *United States vs. Thomason*, 838.

21. **PROCESS STAYED.**—If the pardon is issued after judgment for the penalty, the court may order a stay of proceedings and process. *Id.*
22. **FELONIOUS POSSESSION OF FORGED NATIONAL BANK NOTES.**—An indictment for the felonious possession of a forged national bank note need not aver that the forged instrument purported to be a note of any designated national bank; if the instrument be copied into the indictment, and if by the terms of such copy it purports to be such a note. *United States vs. Williams*, 802.
23. **PLEADING.**—In an indictment for the felonious possession of a forged national bank note it is not necessary that the indictment should aver that the bank is a legal corporation. The national courts will judicially take notice of the existence of all national banks. *Id.*
24. **PERJURY.**—Under the Act of March 3, 1863, the Secretary of War has authority to prescribe what facts shall be stated in affidavits by drafted men claiming exemption from military service; and false swearing in reference to facts so required is perjury. *United States vs. Sonachall*, 425.
25. **NOTARY PUBLIC.**—Is an officer authorized to administer oaths in such cases. *Id.*

CROSS BILL.—*See* PLEADING, 41.

DAMAGES.

1. **ESTIMATING DAMAGES.**—In measuring damages in a case of collision, all the direct and immediate consequences should be considered. *The Morning Star*, 62.
2. **DAMAGES FOR DETENTION.**—In settling the amount of the damages in a case of collision, the detention of the injured vessel while undergoing repairs ought to be regarded. *Id.*
3. A steamer, while towing four barges laden with goods, suffered an in-

DAMAGES—Continued.

- jury by a collision with another steamer. The libel did not state to whom the barges and the goods they carried belonged. *Held*, that the libellant could not recover for the delay to the barges and their lading occasioned by the collision. *Id.*
4. **INTEREST—WHEN ALLOWED.**—On damages sustained by a collision, interest should be allowed from the day on which the injury happened till the day when judgment is rendered for them. *Id.*
5. **INTEREST.**—The jury may allow interest by way of damages since an explosion of a steamer. *Stewart vs. Western Union R. R. Co.*, 363.
6. **MEASURE OF DAMAGES.**—In allowing damages for the killing of a child the jury cannot allow anything for the suffering or wounded feelings of the parents: they can only allow for actual pecuniary loss. If the family is poor, the fact that the boy would probably have early commenced to assist in supporting the family may be taken into consideration. *Barley vs. Chicago & Alton R. R. Co.*, 430.
7. A recovery in a former action for medical attendance, expenses, loss of service and time before his death, does not affect the damages recoverable under the statute for death. *Id.*
8. **DAMAGES.**—Under the Illinois statute, only the amount of the actual pecuniary loss can be allowed; nothing can be added for grief, or loss of society. *Brady vs. City of Chicago*, 448.
9. **PERSONAL INJURIES.**—The business occupation of the plaintiff is a proper element for consideration in computing the damages sustained by a personal injury; but the damages must be reasonable. *Lombard vs. City of Chicago*, 460.
10. **MEASURE OF DAMAGES.**—*It seems*, that full damages can not be recovered for refusing to bid as agreed upon at an execution sale unless the debt was lost in consequence of such failure to bid, or it appeared that the defendant in the execution did not have other property from which the judgment could be made. *Hoppock vs. Wick*, 469.

DEATH BY NEGLIGENCE.—*See* RAILROADS, 1, 6.

DEBT.—*See* PLEADING, 1-3, 12, 23-25.

DEEDS.—*See* REAL ESTATE, 1, 14-16—RECORDING.

DELIVERY.—*See* PLEADING, 26, 29—REAL ESTATE, 1.

1. **PLACE OF DELIVERY BY FACTOR.**—In the absence of any special agreement touching the place of delivery of wheat to be purchased by a commission merchant for his principal, the law will presume the place where the commission merchant does business to be the proper place of delivery. *Rice vs. Montgomery*, 75.
2. **DELIVERY FROM WAREHOUSE—WHEN COMPLETE.**—In delivering wheat from a warehouse through a pipe into a vessel, the duty of the warehouseman is complete, and his liability ended, with the discharge of the wheat into the pipe. *The R. G. Winslow*, 13.

DELIVERY—Continued.

3. **MASTER'S DUTY IN LOADING.**—The duties of the master extend to all that relates to the loading of the cargo, and the vessel is liable for his faithful performance. It is his business to arrange the pipe and trim the vessel. *Id.*
4. For any wheat lost by the careening of the vessel and consequent parting of the pipe, the vessel is liable. *Id.*
5. **PLEDGE.**—To render a pledge valid, the thing pledged must, in general, be delivered to the pledgee. But to this rule there are exceptions. *In re Wiley*, 171.
6. **DELIVERY WHEN NECESSARY.**—A pledge may be valid without delivery, when an actual delivery is impossible. *Id.*
7. The pledge of a note, at the time in the lawful possession of a third person, may be valid without actual delivery to the pledgee. In such a case, the third person may be regarded as the agent of the pledgee, and as holding the note for him. *Id.*

DEPOSITIONS.—*See PRACTICE*, 22.

DILIGENCE.—*See BILLS, NOTES AND CHECKS*, 5.

DIRECTOR.—*See CORPORATION*, 15.

DISCHARGE.—*See BANKRUPTCY*, 83-86.

DISTRIBUTION.—*See BANKRUPTCY*, 29-32.

EQUITY.—*See CHANCERY*.

ESCROW.—*See PLEADING*, 26, 29.

ESTOPPEL.

1. **DIRECTOR—WHEN ESTOPPED BY NOT OBJECTING.**—If a member of a Board of Directors of a corporation be present at the adoption of a resolution and aware of what is being done, and makes no opposition to its adoption, he must be presumed to have assented to it. But if such proceeding be merely preliminary to a decision by a subsequent vote of the stockholders on the consolidation of the corporation with another corporation, which can only be ultimately decided by the vote of all the stockholders, and not of the board of directors, such consent so given by a member of the board of directors, who is also a stockholder, does not estop him from afterwards objecting to the consolidation. *Mowery vs. Ind., & Cin., R. R. Co.*, 78.
2. **SILENCE OF ASSIGNEE.**—When a judgment creditor assigned his judgment to a third person, and the debtor, hearing a rumor that the judgment has been assigned, but not understanding to whom it was assigned, applied to the assignee for information on that point, and the assignee refused to tell him who was the assignee: *Held*, that, under such circumstances, the debtor might safely pay to the original judgment creditor. *The "Lutie D."* 249.
3. **DEFECTS—ACCEPTANCE, WHEN WAIVER.**—When a lease provided that the steamer was in good condition when delivered, and the lessee accepted her without objection, he is estopped from setting up as a defense

ESTOPPEL—Continued.

- any defects which were known, or might have been seen, by him or his servants. *Stewart vs. Western Union R. R. Co.*, 362.
4. **RES JUDICATA.**—To render a former adjudication an estoppel, the point adjudicated must have been admitted, or distinctly put in issue in the course of the former adjudication. *Putnam vs. New Albany*, 365.
 5. **PAROL EVIDENCE**, in aid of the record to establish an estoppel, cannot be tolerated. *Id.*

EVIDENCE.—See PAYMENT, 6—RES JUDICATA.

1. **PAROL EVIDENCE**, in aid of the record to establish an estoppel, cannot be tolerated. *Putnam vs. New Albany*, 365.
2. Where a freight bill is signed "W. T. Noell & Co., Agents," not appearing on its face to be the contract of a railroad company, parol evidence is not admissible to show that it is the contract of the company. *Dixon vs. Col. & Ind. R. R. Co.*, 137.
3. **ONUS PROBANDI.**—In the charge of a breach of a common law duty—as the duty of a common carrier—denied by the defendant, the burden of proving the breach is with the party alleging it, whether it is alleged as a mal-feasance or a non-feasance; and he cannot recover without proving it. *Id.*
4. **BURDEN OF PROOF.**—In a suit by assignees of a note and mortgage, if the assignment is denied it must be proved. *Wyman vs. Russell*, 307.
5. **BURDEN OF PROOF.**—The defense of incendiarism, fraud, or negligence must be made out by a preponderance of proof. Such proof may, however, be circumstantial, if sufficient and convincing. *Huchberger vs. Merchants' Fire Ins. Co.*, 265.
6. **CREDIBILITY** of witnesses is the province of the jury alone—tests of evidence stated. *Id.*
7. **CONFISCATION—PLEADING—PAROL EVIDENCE—CONTRADICTING OFFICER'S RETURN.**—Assumpsit on a note for \$1,010, executed by Robert Spaugh, Thomas Essex, and John Essex to the plaintiff. Plea, non-assumpsit. The defendants offered in evidence a record of the United States District Court for the District of Indiana, showing a confiscation proceeding and sentence against the plaintiff concerning a note described therein as a note of \$1000, executed to him by Robert Spaugh and John Essex, and showing that the last-named note had been seized by the marshal under proper process, confiscated by the court, and sold on a *venditioni exponas* by the marshal. The defendants offered to prove by parol that the latter was the same note sued on in this action. And the plaintiff offered to prove by parol that the marshal's return that he had seized the note was false; and that the charge against him of aiding and abetting the rebellion, on which the sentence of confiscation is founded, was untrue.

Held, that the plaintiff could not contradict the marshal's return by parol evidence;

Held, that the plaintiff could not contradict said record by proving that he never aided or abetted the rebellion;

EVIDENCE—Continued.

Held, that parol evidence was inadmissible to prove that the note confiscated is the same note on which this suit is founded;

Held, that the said record of confiscation is conclusive upon the parties to this action as to all facts alleged in it;

Held, that, under the evidence in the case, the plaintiff was entitled to recover the amount of his note and interest. *Vogler vs. Spaugh*, 288.

8. SUPPRESSING DEPOSITIONS.—A motion to suppress depositions for irregularity comes too late when they have been on file for three years. *Bank of Danville vs. Travers*, 507.

9. WAIVER.—A letter offering to compromise, but containing a waiver may be read in evidence, not to prove the offer, but to establish the waiver. *Unthank vs. Travelers' Ins., Co.*, 357.

EXCHANGE.—*See* BILLS, NOTES AND CHECKS, 2, 3.

EXEMPTIONS.—*See* BANKRUPTCY, 15-18.

EXHIBITS.

There is no rule in equity pleading requiring that either writings mentioned in a bill, or copies of them, shall be filed, as exhibits with the bill. *Putnam vs. New Albany*, 965.

FACTOR AND PRINCIPAL.—*See* PRINCIPAL AND AGENT.

FEES.—*See* WITNESSES.

ATTORNEY'S FEES ALLOWED PETITIONING CREDITOR.—In a case of involuntary bankruptcy, the creditor on whose petition the debtor is adjudged a bankrupt, and who pays his attorney a reasonable fee for prosecuting the proceeding, is entitled to receive the amount so paid out of the assets of the bankrupt before a dividend is made among the creditors. But he is not entitled to such preference for time and money spent in traveling to and from the court, and in attending it during the trial of the case. *In re King*, 819.

FIERI FACIAS.—*See* ATTACHMENT.

FINES AND PENALTIES.—*See* PLEADING, 2, 3, 12, 13, 23-25—CRIMINAL LAW, 20, 21.

FORECLOSURE.—*See* LIMITATION.

FORGERY.—*See* PLEADING, 7, 8—CRIMINAL LAW, 18, 19, 22, 23.

FORMER RECOVERY.—*See* DAMAGES, 7—RES JUDICATA, 1, 2.

FRAUD.—*See* INSURANCE, 1.

FREIGHT MONEY.—*See* COMMON CARRIER, 3.

HIGHWAY.—*See* NEGLIGENCE, 4, 5, 7, 8.

INCENDIARISM.—*See* INSURANCE, 2.

INDICTMENT.—*See* PLEADING, 4, 7—CRIMINAL LAW, 4-6, 17, 22, 17, 22.

INDORSEMENT.—*See* BILLS, NOTES AND CHECKS, 1, 5-11.

INFORMATION.—*See* CRIMINAL LAW; 10.

INFORMER.—*See* COMMON INFORMER.

INJUNCTION.—*See* PRACTICE, 9.

1. **INJUNCTION—WHEN GRANTED.**—A temporary injunction will be decreed where without it great injury may happen to the complainant, and no injury can result from it to the defendant. *Pullan vs. Cin., & Chicago Air-Line R. R. Co.*, 35.
2. **TEMPORARY INJUNCTION—NOTICE.**—The national courts cannot order temporary injunctions, except on reasonable notice to the adverse party or his attorney. *Mowery vs. I. & O. R. R. Co.*, 78.
3. **CREDITOR CANNOT SELL SECURITIES—COURT WILL RESTRAIN.**—A creditor holding security has not an absolute power over his securities, and the court will, on application of the assignee, restrain the creditor from selling them. *The Skylark*, 388.
4. **DISSOLUTION OF INJUNCTION.**—An injunction issued by a state court is dissolved by the removal of the cause into the Federal Court. *Northwestern Distilling Co. vs. Corse*, 514.

INSURANCE.

1. **FRAUD.**—If the insured has intentionally endeavored to make out his loss larger than it was, he cannot recover his actual loss; otherwise, if he make out the loss from his best recollection, without intention to deceive. *Huchberger vs. Merchants' Fire Ins. Co.*, 265.
2. **BURDEN OF PROOF.**—The defense of incendiarism, fraud, or negligence must be made out by a preponderance of proof. Such proof may, however, be circumstantial, if sufficient and convincing. *Id.*
3. **ACCIDENT INSURANCE—WAIVER.**—Where, by a policy, the defendant insured the plaintiff against bodily injuries arising by violence and accident, under this condition, that in case of such injury to the insured during the life of such policy, he should give the insurance company forthwith, by letter addressed to the company at Hartford, a notice stating the nature and extent of the accident and injury; and where, on the happening of the same, he omitted to give such notice,—
Held, that, where, on receiving proof of the injury by violence and accident, the company examined the proofs, and refused to pay the policy on other grounds than the omission to give such notice, the condition of the policy requiring such notice was thereby waived; and that, the other necessary facts being proved, the insured was entitled to recover on the policy. *Unthank vs. Travelers' Ins. Co.*, 357.
4. **INSURER OF FREIGHT MONEY.**—A temporary retardation, and subsequent sale of the cargo by the owner, does not constitute an abandonment, nor deprive the carrier of his right to the freight money; he therefore, cannot recover from the insurer of the freight money. *Murray vs. Athol Ins. Co.*, 417.
5. **CONDITION IN INSURANCE POLICY.**—A condition in an insurance policy, avoiding it if the property should be sold or conveyed without the consent of the company, is not broken by the sale of an interest in the property. The policy still covers the interest remaining in the insured. *Seamon vs. Union Fire Ins. Co.*, 511.

INTEREST.—*See* DAMAGES, 4, 5.

INTERNAL REVENUE.—*See* CRIMINAL LAW, 1, 4, 7, 8, 10, 20—COMMON INFORMER—PLEADING, 1, 4, 12, 27.

1. **GAINS—PROFITS—INCOME.**—In 1863, the Lafayette and Indianapolis R. Co. accumulated a fund of \$100,000 in U. S. bonds as net earnings. In 1867, by consolidation with another road, it ceased to exist. By the articles of consolidation, this fund was transferred to the plaintiff, as a trustee for the use of the stockholders in the first-named company. An assessor of internal revenue assessed on this fund in the hands of the trustee, \$5,000 of taxes, as being gains, profits, and income accrued to the beneficiaries in the year in which the trustee received the fund. To make this tax, the collector of internal revenue, the defendant, threatened to distrain the trustee's property. To avoid such distress, the latter, under protest, paid the \$5,000.

Held, that said \$100,000 was not, under the circumstances, liable to the tax of \$5,000; and that the tax so paid might be recovered. *Reynolds vs. Williams*, 108.

2. **PENALTY—HOW RECOVERED.**—A prosecution for a penalty under the 3rd section of the act of July 4, 1864, regulating the carriage of passengers on steamships, must be by action of debt, and not a libel *in rem*. *The Nashville*, 188.
3. **REVENUE LAWS**—are those laws only whose principal object is the raising of revenue, and not those under which revenue may incidentally arise. *Id*.

JUDGMENT.—*See* RECORDING. 7—REAL ESTATE, 17.

1. **JUDGMENT—HOW ASSIGNABLE.**—In Indiana, judgments are assignable by indorsements on the records of them, attested by the clerk. *Cassender vs. Groves*, 269.
2. **PAYMENT TO ASSIGNOR.**—Judgment may be assigned otherwise than of record. But in such case any payment or satisfaction of the judgment made to the assignor before the defendant has notice of the assignment, is valid. *Id*.
3. **No agreement for the full satisfaction of a judgment, made in consideration of the payment of a less sum than the amount of the judgment, is a full satisfaction of it.** *Id*.
4. **SATISFACTION—DEFENSE.**—On a motion to enter satisfaction of a judgment, nothing can be heard in support of it which might have been set up as a defense to the action in which the judgment was rendered. But if such defense is omitted to be pleaded to the action, and if it might be the subject of a cross action against the party recovering the judgment, the matter of such defense may, by agreement of the parties, furnish sufficient consideration for a contract between them to satisfy the judgment. *Id*.
5. **SATISFACTION—BURDEN OF PROOF.**—When a judgment creditor executes a written acknowledgment of the satisfaction of his judgment,

JUDGMENT—Continued.

and this is duly shown in evidence on a motion for satisfaction to be entered, the burden of proving that such acknowledgment is void for want of consideration or otherwise devolves on the creditor; and if he fails to make such proof, satisfaction of the judgment will be entered. *Id.*

6. **PRACTICE**.—The Indiana code authorizes a plaintiff, in a proceeding to foreclose a mortgage, to take a personal judgment for the debt secured by it, if such debt be evidenced by a note or other writing than the mortgage. *Putnam vs. New Albany*, 365.
7. **LIEN OF JUDGMENT—MARSHALING OF ASSETS**.—A judgment rendered in the Circuit Court of the United States for the District of Indiana, is a lien from its date on all the lands of the defendant situated within the district. And if, after its rendition, the defendant acquires other lands in the State, the lien of such judgment instantly attaches on these lands also; and a sale of them by the defendant, made before execution issues on the judgment, does not divest the lien. And, in such a case, the purchaser of the subsequently acquired land cannot, as against a prior purchaser of the land on which the judgment became a lien at the moment of its rendition, insist that the officer shall first levy on and sell the lands held by such prior purchaser, before the subsequently acquired lands shall be levied on and sold. *Barth vs. Makeover*, 206.

JUDICIAL SALE.—See ATTACHMENT.**JURISDICTION.—See CONFLICT OF JURISDICTION—ADMIRALTY, 4-6.**

1. **CORPORATIONS—WHEN MAY SUE IN FEDERAL COURTS**.—A corporation which has a legal existence in any one state, can sue in the federal courts of any other state. It is not necessary that it be a corporation created by the laws of that state. *National Park Bank vs. Nichols*, 815.
2. **CITIZENSHIP OF CORPORATORS**.—It is a presumption—which the courts will not allow to be rebutted—that if a corporation has a legal existence in a state, its corporators are citizen of the same state. *Id.*
3. In a suit against a corporation in the United States Circuit Court for the state, by a citizen of another state, service of process within the state upon a joint defendant, a citizen of a third state, gives the court jurisdiction over him. *Mowery vs. Ind. & Cin. R. R. Co.*, 78.
4. **CITIZENSHIP**.—The defendant executed a note to S. Strous or order. Strous indorsed it in blank, and then re-delivered it to the defendant, who thereupon delivered it to the plaintiffs. The declaration averred that it was an accommodation note, and that Strous never had any interest in it.

Held, that, under the 11th section of the Judiciary Act, the court has no jurisdiction of the case unless it appear by an averment in the declaration that Strous, as well as the plaintiffs, is a citizen of a state other than Indiana. But the rule is otherwise as to foreign bills of ex-

JURISDICTION—Continued.

- change, bills and notes payable to bearer, and suits by indorsees against their immediate indorsers. *Noell vs. Mitchell*, 346.
5. It is a general rule that, to give the United States courts jurisdiction of a cause, the plaintiffs and defendants must be citizens of different states. But to this rule there are several exceptions. *Connell vs. White Water Valley Canal Co.*, 195.
6. In a cause over which a national court has acquired jurisdiction solely by reason of the citizenship of the parties, if the rights and interests of third persons should become complicated with the litigation, either as to the original judgment, or any property in the custody of the court, or any abuse or misapplication of its process; and if no state court has power to guard and determine those rights and interests without a conflict of authority with the national court, the latter court will, from the necessity of the case, and to prevent a failure of justice, give such third persons a hearing without regard to their citizenship, so far as to protect their rights and interests relating to such judgment or property, and so far as to correct any abuse or misapplication of its process, and no farther. The court will not entertain jurisdiction on behalf of a citizen of the state to litigate new or original matters, or any which might be settled in a state court without interfering with the jurisdiction already attached. *Id.*, and *Barth vs. Makeover*, 206.
7. BILL MUST ALLEGE JURISDICTIONAL FACTS.—A bill in equity in this court must distinctly state the citizenship of every necessary party to it, and show that the complainants and defendants are citizens of different states. And if it fails to do this, it will be bad on demurrer; and any decree on it in favor of the complainants would be liable to reversal in the Supreme Court. No appearance, demurrer, or answer to such a bill will waive this omission in it. *Speigle vs. Meredith*, 120.
8. WHEN EXCLUSIVE.—It is a general rule that when different courts have concurrent jurisdiction of a matter, the first that takes the jurisdiction excludes the others. But to this rule there are exceptions. *Putnam vs. New Albany*, 365.
9. TO ENFORCE JUDGMENT OF STATE COURT.—When a party has obtained a judgment in a state court against a corporation, on account of whose insolvency he is unable to collect the same, he may file his bill in equity in a national court to oblige the debtors of the corporation to pay the judgment, if the citizenship of the parties to the bill will confer the jurisdiction according to the provisions of the Judiciary Act. *Id.*

JUSTIFICATION.—See PLEADING, 33-38.

LAW MERCHANT.—See BILLS NOTES, AND CHECKS, 5, 10.

LEASE.—See ESTOPPEL, 8.

LESSEE.—See NEGLIGENCE, 1, 2

LEX LOCI.

1. **INDORSEMENT GOVERNED BY *Lex Loci*.**—The indorsement of a note is a new, distinct contract; and such contract is governed by the law of the place where it is made, without regard to the law of the place where the note was made. *Mott vs. Wright*, 58.
2. **LEX LOCI CONTRACTUS—DELIVERY.**—The contract of indorsement includes two essential things: the writing itself, and the delivery of it to the indorsee. And if the indorsement is written in one state, and delivered to the assignee in another, the law of the latter state controls the contract. *Id.*
3. A indorsed notes in Indiana, and sent them by mail to B, the indorsee, in New York, where B received them. *Held*, that the indorsement was governed by the law of New York. *Id.*

LABEL.—*See* PLEADING, 82-88.

LIEN.—*See* JUDGMENT, 7—NATIONAL BANKS, 1, 3—BANKRUPTCY, 27—RECEIVER, 4, 5.

A person who in one State advances money to release a boat belonging in another state from the possession of the marshal of the former state, has a lien upon the money so advanced which he can enforce *in rem* in a court of admiralty. *The J. R. Hoyle*, 234.

LIMITATION.

1. **FORECLOSURE—LIMITATION.**—As a general rule, mortgages cannot be foreclosed after the lapse of twenty years from the date when the cause of action accrued. *Wyman vs. Russell*, 307.
2. **EFFECT OF EXTENTION ON NOTE.**—A mortgage was made in 1838, to secure notes which on their face fell due in nine months thereafter. A suit to foreclose this mortgage was commenced in 1860. On each note the mortgagees indorsed an agreement to delay the collection of the notes for three years from the date of the mortgage. But these indorsements were not referred to in the mortgage, nor recorded. *Quare*, did this engagement thus indorsed on the notes, as between the mortgagee and an innocent purchaser, take the case out of the operation of the Indiana statute of limitation of twenty years? *Id.*

LOOK OUT.—*See* RAILROADS, 3.

MANDAMUS.—*See* PRACTICE, 20.

MARITIME LIEN.—*See* BANKRUPTCY, 9.

MARSHAL AS MESSENGER.—*See* BANKRUPTCY, 10.

MARSHALING OF ASSETS.—*See* BANKRUPTCY, 6, 29-31.

MASTER.—*See* ADMIRALTY, 13.

MEASURE OF DAMAGES.—*See* DAMAGES.

MORTGAGE.—*See* CORPORATION, 2-5, 8, 11—CHATTEL MORTGAGE—LIMITATION—RECORDING, 8—BANKRUPTCY, 25.

1. **CORPORATE POWERS.**—A corporation has only such powers as its charter gives, either expressly, or as incident to its existence. *Pullan vs. Otn. & Chicago Air-Line R. R. Co.*, 35.

MORTGAGE—Continued.

2. **POWER TO MORTGAGE FRANCHISES.**—No corporation can mortgage its franchises without clear legislative authority to do so. And authority to a railroad company to mortgage its "road, income, and other property," does not authorize a mortgage of its franchises. *Id.*
3. **Legislative authority to mortgage** includes the power to make a deed of trust in the nature of a mortgage. *Id.*
4. **A trust deed may be void in part, and valid in part.** *Id.*
5. **ROLLING STOCK—WHEN INCLUDED IN MORTGAGE.**—A mortgage by a railroad company of "all the present and future-to-be-acquired property of the company, including the right of way and land occupied, and all rails, and other materials used therein or procured therefor," includes the rolling stock of the road. *Id.*
6. **PARTICULAR DESCRIPTION CONTROLS GENERAL TERMS.**—Where a mortgage, in describing property, employs at first general terms, and afterwards proceeds to describe particularly each thing mortgaged, the latter will control the former, if there be a repugnancy. *Id.*
7. **SPECIFICATION—WHEN EXCLUSIVE.**—In a deed, specification generally excludes things not specified. But the omission to specify a thing, without which the things specified would be of no value, does not exclude it. *Id.*
8. **A railroad company having a general power to mortgage its road may mortgage any part of it.** *Id.*

MUNICIPAL CORPORATIONS.—*See* ADMIRALTY, 34—NEGLIGENCE, 4, 7, 8.

NAME.—*See* BANKRUPTCY, 20—PLEADING, 39.

NATIONAL BANKS.

1. **LIEN OF NATIONAL BANK ON SHARES OF STOCK—EFFECT OF BY-LAW.**—A national bank has power to make a by-law creating a lien on the stock of every stockholder for his liabilities to the bank. And such a lien is created by a by-law which provides that no transfer of the stock of the bank shall be made without the consent of the board of directors, by any stockholder who shall be liable to the bank, either as principal debtor or otherwise. *In re Robert Dunkerson, & Co.*, 237.
2. **TITLE OF ASSIGNEE.**—An assignee in bankruptcy has the same title to the bankrupt's estate, which the bankrupt himself had before the adjudication of bankruptcy. But an exception to this rule obtains where the bankrupt has transferred his property to defraud his creditors. *Id.*
3. **RIGHTS OF BANK.**—Under the by-laws of a bank creating a lien on the stock of every stockholder for his liabilities to the bank, a stockholder, owning one hundred and thirty shares in the bank, and being indebted to the bank in \$20,000, was adjudged a bankrupt.
Held, that, under these circumstances, the bank was not bound to transfer the stock to his assignee. *Id.*
Held, also, that the lien of the bank on the stock was not defeated by the adjudication of bankruptcy; that the stock should be sold,

NATIONAL BANKS—Continued.

and the proceeds applied to the payment of the debt due the bank so far as the same would go; and that, for the residue of its debt, the bank might prove its claim with a view to a dividend out of the assets of the bankrupts estate. *Id.*

4. **BY-LAW IS A CONTRACT.**—A by-law of a bank is a contract between the stockholders; and the ordinary rules of construing contracts apply in its construction. And, if possible, it should so be construed *ut res magis valeat, quam pereat*. *Id.*
5. **STATE TAXATION OF NATIONAL BANKS.**—The capital stock of a national bank cannot be assessed, as such, by state authority. *Collins vs. City of Chicago*, 472.
6. The only way such stock can be reached is by assessment of the shares of the different stockholders. *Id.*

NAVIGATION.—See ADMIRALTY.

NEGLIGENCE.—See RAILROAD, 1-4—ADMIRALTY, 19.

1. **LIABILITY FOR EXPLOSION.**—If a steamer, while being run under a lease, is lost by explosion, it is a question of fact for the jury whether the lessee used all reasonable skill, and whether the explosion was one which human skill could have prevented. *Stewart vs. Western Union R. R. Co.*, 363.
2. **HIDDEN DEFECT.**—If the explosion was the result of some hidden, unknown defect then the lessee is discharged. *Id.*
3. **DUTY OF PEDESTRIAN.**—It is incumbent upon a pedestrian, crossing a swing bridge, to use reasonable care and caution, even though the city was negligent; and if he fails to do so, his administrator cannot recover damages for his death. *Brady vs. City of Chicago*, 448.
4. **DUTY OF CITY IN PROTECTING NARROW COURTS.**—At excavations for admitting light in basement windows, in a narrow court, the city should require the owner to place guards as security against possible accidents; and it is negligence in the city to allow them to remain open. *Lombard vs. City of Chicago*, 460.
5. **DEGREE OF OBLIGATION—DUTY OF PEDESTRIAN.**—The city, however, is not held to the same obligation as in a more public thoroughfare, and the passer-by must exercise due care, considering the character of the court and the purpose for which it was constructed. *Id.*
6. **CONTRIBUTORY NEGLIGENCE.**—If the plaintiff did not exercise that degree of caution which a prudent man ought under all the circumstances to have exercised, he cannot recover, even though the city was guilty of negligence. *Id.*
7. **STEPS IN SIDEWALKS—DUTY OF CITY.**—The mere existence of a descent or step in the sidewalks of a city is not such a defect as to render the city liable for accidents to passengers in stepping from one elevation to another; the question is, whether the sidewalk or descent was properly constructed, in reference to the character of the city and condition of the streets. *Clark vs. City of Chicago*, 486.

NEGLIGENCE—*Continued.*

8. ICE UPON SIDEWALKS.—The city is not bound, under all circumstances, to keep the sidewalk free from ice; it is only required to exercise reasonable diligence under the circumstances of the case. *Id.*
9. NEGLIGENCE—APPORTIONMENT.—If the navigators of a vessel by their negligence directly contribute to her injury by a collision, her owner cannot recover the full amount of his loss. If both boats are in fault, the damage is apportioned. *The Morning Star*, 62.
10. LOOKOUT.—*It seems* that, in navigating our rivers, a lookout at the stern of the vessel is not required, except when she is backing. *Id.*

NEWSPAPER PRIVILEGE.—*See* PLEADING, 36.

NOTARY PUBLIC.—*See* CRIMINAL LAW, 25.

NOTICE.—*See* PAYMENT, 1—RECORDING, 2, 3—REAL ESTATE, 12, 13.

OBSTRUCTION IN RIVER.—*See* ADMIRALTY, 34.

OFFICER'S RETURN.—*See* EVIDENCE, 7.

OMISSION TO SCHEDULE.—*See* BANKRUPTCY, 33.

ONUS PROBANDI.—*See* EVIDENCE, 3-5.

OPPOSITION TO DISCHARGE.—*See* BANKRUPTCY, 35.

PARDON.—*See* CRIMINAL LAW, 20, 21.

PARTIES.—*See* CHANCERY, 3, 4.

PARTIES.—Purchasers *pendente lite* are not necessary parties to a bill in chancery. The judgment binds them, though they are not brought before the court.—*Pullan vs. Cin. & Chicago Air-Line R. R. Co.*, 35.

PARTNERSHIP.—*See* BANKRUPTCY, 29-34—TRADE MARK.

PAYMENT.

1. PAYMENT to original judgment creditor, made at any time before the judgment debtor has notice that the judgment is assigned, is valid. *The "Lutie D."* 249.
2. When a judgment debtor pays to the judgment creditor a part of the amount of the judgment by agreement between them that such payment shall operate as a full satisfaction, such agreement is void, as wanting a sufficient consideration. *Id.*
3. SILENCE OF ASSIGNEE.—When a judgment creditor assigned his judgment to a third person, and the debtor, hearing a rumor that the judgment has been assigned, but not understanding to whom it was assigned, applied to the assignee for information on that point, and the assignee refused to tell him who was the assignee: *Held*, that, under such circumstances, the debtor might safely pay to the original judgment creditor. *Id.*
4. PAYMENT.—No agreement for the full satisfaction of a judgment, made in consideration of the payment of a less sum than the amount of the judgment, is a full satisfaction of it. *Cavender vs. Grove*, 269.

PAYMENT—Continued.

5. **SATISFACTION—DEFENSE.**—On a motion to enter satisfaction of a judgment, nothing can be heard in support of it which might have been set up as a defense to the action in which the judgment was rendered. But if such defense is omitted to be pleaded to the action, and if it might be a subject of a cross action against the party recovering the judgment, the matter of such defense may, by agreement of the parties, furnish sufficient consideration for a contract between them to satisfy the judgment. *Id.*
6. **SATISFACTION—BURDEN OF PROOF.**—When a judgment creditor executes a written acknowledgment of the satisfaction of his judgment, and this is duly shown in evidence on a motion for satisfaction to be entered, the burden of proving that such acknowledgment is void for want of consideration or otherwise devolves on the creditor; and if he fails to make such proof, satisfaction of the judgment will be entered. *Id.*

PENAL STATUTES.—*See* INTERNAL REVENUE—PLEADING, 24, 25.

PERJURY.—*See* CRIMINAL LAW, 24.

PETITION FOR REVIEW

WHEN MAY BE FILED.—A petition for review, filed after the term at which the decree was rendered, and after it had been executed, will be entertained by a court of admiralty, when actual fraud is charged, and the libellant is without fault, and would otherwise be without remedy. *Northeastern Car Co. vs. Hopkins*, 51.

PLEADING.—*See* EVIDENCE, 7.

1. **VIOLATION OF REVENUE LAW.**—No action of debt will lie on the 73d section of the Internal Revenue Law of June 30, 1864. The prosecution must be by indictment. *United States vs. Morin*, 83.
2. **FORM OF PROSECUTION.**—When a statute renders an offense punishable by imprisonment or fine, or both, the district attorney cannot waive the imprisonment, and sue in debt for the fine. *Id.*
3. *Quære*, whether debt will lie on a penal statute which does not fix the amount of the penalty. *Id.*
4. **PARTICULARITY IN INFORMATION.** An information under the Internal Revenue Law claiming a forfeiture of a distillery, and things connected with it, for a violation of that law, must describe with reasonable certainty the things on which a judgment of forfeiture is asked. It is not sufficient to describe them as "all the boilers, stills, and other vessels used in the distillation of spirits, and all the distilled spirits—being about twelve barrels—now in the distillery owned by Samuel W. Walts." *United States vs. One Distillery*, 26.
5. **MAY NOT NEGATIVE A PROVISO.**—A pleading on a statute is not required to negative an exception in a proviso to it. *Id.*
6. An information of this kind must aver that the property sought to be

PLEADING—Continued.

- adjudged forfeited, was used in the illicit distillation charged, or (being spirits) was the product of such distillation. *Id.*
7. **INDICTMENT—FORGED TREASURY NOTES AND POSTAL CURRENCY.**—An indictment for possessing forged treasury notes and postal currency with intent to pass them, must profess to give, and must actually give, exact copies of them, or allege a reasonable excuse for not doing so. *Quære*, whether in such a case it is sufficient to paste the forged instruments themselves on the indictment as part of it? *United States vs. Fiesler*, 59.
8. **PARTICULARITY IN INDICTMENT.**—To charge in the indictment in such a case, that the prisoner had in possession "divers" such forged instruments, is too indefinite. The number ought to be stated. *Id.*
9. **INDICTMENT.**—When an offense is prohibited by several statutes, it is usual to conclude the indictment *contra formam statutorum*. But a conclusion *contra formam statuti* in such a case will not be sufficient to support a motion in arrest of judgment. So, a conclusion in the plural where there is but one prohibitory statute, is not ground for motion in arrest of judgment. *United States vs. Trout*, 105.
10. **FORGING TREASURY NOTES.**—An indictment for forging treasury notes need not in terms give them that name. The court will determine what they are by the copies of them set out in the indictment. *Id.*
11. In an indictment for forging a treasury note, it is not necessary to aver that it was made in the resemblance of the genuine notes. *Id.*
12. **INDICTMENT UNDER REVENUE LAWS.—DEBT**—Under the Internal revenue laws, when the punishment prescribed is a pecuniary penalty or fine only, and the act fixes the exact amount of it, the action of debt will lie to cover it. *United States vs. Ebner*, 117.
13. Where the punishment provided is a fine only, and the amount of it is not fixed, but left to the discretion of the court, the prosecution for it must be by indictment. *Id.*
14. In all cases in which the law provides that imprisonment either may or must be any part of the punishment, the prosecution must be by indictment. *Id.*
15. **FELONIOUS POSSESSION OF FORGED NATIONAL BANK NOTES.**—An indictment for the felonious possession of a forged national bank note need not aver that the forged instrument purported to be a note of any designated national bank, if the instrument be copied into the indictment, and if by the terms of such copy it purports to be such a note. *United States vs. Williams*, 302.
16. **PLEADING.**—In an indictment for the felonious possession of a forged national bank note, it is not necessary that the indictment should aver that the bank is a legal corporation. The national courts will judicially take notice of the existence of all national banks. *Id.*
17. **JOINDER OF COUNTS.**—Counts for conspiracy cannot be joined with counts for murder. *United States vs. Scott*, 29.

PLEADING—Continued.

18. In what cases an indictment will be sufficient, which charges the crime in the terms of the statute creating it. *Id.*
19. REQUISITES OF A GOOD INDICTMENT for murder under an act of Congress punishing opposition to the enrollment of the national forces. *Id.*
20. In the national courts there can be no indictment unless some act of Congress authorizes it. *Id.*
21. ACTION ON THE CASE—WHEN IT LIES.—There are two cases of injuries on which the action on the case lies,—*first*, when there has been no contract, and a tort is unaccompanied by force, and is followed by a consequential injury; *second*, where a contract, express or implied, exists out of which a common law duty arises, and the party on whom that duty devolves is guilty of malfeasance, misfeasance, or non-feasance in regard to it. *Emigh vs. Pittsburg Ft. W. & Chicago R. R. Co.*, 114.
22. EJECTMENT FROM RAILROAD TRAIN.—When a railroad company engages to carry a passenger, and, after taking him on the train, wrongfully puts him off, the action of trespass on the case will lie. *Id.*
23. PENALTY—HOW RECOVERED.—A prosecution for a penalty under the 3rd section of the act of July 4, 1864, regulating the carriage of passengers on steamships, must be by action of debt, and not a libel *in rem*. *The Nashville*, 188.
24. DEBT—will lie upon a penal statute; it lies whenever the obligation is to pay a sum certain, or which may be readily rendered certain, whether the liability arises on simple contract, legal liability, specialty, record or statute. *Union Iron Co. vs. Pierce*, 327.
25. INDIVIDUAL LIABILITY OF CORPORATORS.—When the charter of a corporation provides that where its officers shall neglect to make and publish certain reports required, they shall be individually liable for all corporation debts contracted while they are officers or stockholders; and when, while they were such, they were guilty of such neglect, and in the meantime the corporation became indebted to the plaintiff by note,—*Held*, that he might maintain an action of debt therefor against such delinquent officers. *Id.*
26. BOND—PLEADING—CONDITIONAL DELIVERY.—In a suit on a distiller's bond against him and his sureties, one of the sureties pleaded that he signed the bond and delivered it to the principal obligor on condition that it should not be delivered to the obligee till it was signed by one B; that said B never signed it; that the agent of the obligee, when he accepted and approved the bond, had notice of such conditional delivery; and that so the writing was not the surety's deed. *Held*, that as to the surety, the writing was a mere escrow, and that the plea was good. *United States vs. Hammond*, 283.
27. TRAVERSE.—The condition of the bond was that the principal obligor, a distiller, should faithfully comply with all the requirements of law

PLEADING—Continued.

in relation to distilled spirits. And the breach laid was that the principal obligor, having manufactured one thousand gallons of spirits at his distillery, had sold and removed for sale the same therefrom without first paying the taxes thereon as required by law. Plea, that he did not sell or remove for sale said spirits or any part thereof, without having first paid the tax thereon as required by law. *Held* a good plea on general demurrer. *Id.*

79. **PENAL BOND—PLEADING.**—A breach of the condition of a penal bond is not sufficiently traversed by a plea averring that the obligors have not violated the condition to the extent charged in the declaration. It should deny any breach of the condition as charged in the declaration. *United States vs. Davis*, 290.
80. **ESCROW.**—A special plea of *non est factum*, averring that the supposed bond sued on is a mere escrow, is bad, unless it avers that the instrument in question was delivered to some third person on a condition that has not been performed. But with such an averment, the plea may be a good special *non est factum*. *Id.*
80. **BREACH OF COVENANT.**—It is not a breach of the covenant of warranty of seisin to show a conveyance by the defendant's grantor subsequent to the conveyance to defendant; it should be alleged that there was a valid and subsisting title in the grantor, at the time the deed was made, upon which the breach is alleged. *Vorheis vs. Forsythe*, 400.
81. **TAX DEED.**—A judgment for taxes, sale, and tax deed, constitutes a breach of the covenant against incumbrances, and it is not a good plea that the sale was not valid. *Id.*
82. **PLEADING QUANTUM MERUIT.**—An averment that the defendant promised to pay the plaintiff reasonable commission as a factor, ought to be followed by an allegation of the reasonable value of such commission. *Rice vs. Montgomery*, 75.
83. **PLEADING IN LIBEL—JUSTIFICATION.**—A plea of justification must be broad as the libel, and answer every material part of the declaration. *Smith vs. Tribune Co.*, 471.
84. **MATERIALITY OF ALLEGATION.**—An allegation that the plaintiff, in order to avoid arrest for participation in an offense, feigned insanity, and took refuge in a lunatic asylum, is a material part of the libel. *Id.*
85. **SEPARATE PLEAS TO SEVERAL ALLEGATIONS.**—It is not necessary that one particular plea answer the whole libel, if the whole is answered by the different pleas. The defendant may justify separately and distinctly, but in such case the pleas should purport to answer only the particular charges. *Id.*
86. **NEWSPAPER PRIVILEGE.**—It is not a good plea that the plaintiff was a public man, a lecturer and speaker, and professed to be an educator of the public, and that the defendant, a public journal, made the

PLEADING—*Continued.*

- publication complained of with good intent, having reason to believe it to be true. A journal has no right to make specific charges against a man, unless they were actually true, and honesty of motive is not a sufficient defense. *Id.*
87. A demurrer to a count must take the innuendoes as alleged. *Id.*
88. Plea of not guilty puts in issue the question whether the proof supports the innuendoes. *Id.*
89. A bill is defective which does not give the full names of all the parties to whom it refers. *Barth vs. Makeover*, 206.
40. CODE—CUMULATIVE REMEDIES.—The Indiana code of procedure, which gives certain equitable remedies in courts of law, is, as to these, cumulative only; and it does not take from courts of equity those remedies which existed before the code was adopted. *Putnam vs. New Albany*, 365.
41. CROSS-BILL.—In a suit in equity in this court, in which all the defendants are citizens of Indiana, one defendant cannot file a cross-bill against his co-defendants proposing to litigate subjects foreign to the matters set up in the original bill, and in which the original complainants have no interest. *Id.*
42. EXHIBITS.—There is no rule in equity pleading requiring that either writings mentioned in a bill, or copies of them, shall be filed, as exhibits, with the bill. *Id.*
43. PETITION FOR REVIEW—WHEN MAY BE FILED.—A petition for review, filed after the term at which the decree was rendered, and after it had been executed, will be entertained by a court of admiralty, when actual fraud is charged, and the libellant is without fault, and would otherwise be without remedy. *Northwestern Fur Co. vs. Hopkins*, 51.
44. AFFIDAVIT.—There is no rule in admiralty in the District Court for Indiana, requiring that libels *in rem* in civil causes shall be supported by the affidavit of the libellant. *The J. R. Hoyle*, 234.
45. Libels in civil actions *in rem* need not state the occupation and residence of the libellant. *Id.*
46. NEGLECT TO PUT SYNOPSIS OF LAWS ON STEAMER—PENALTY.—A proceeding *in rem* is the proper mode of prosecution for the violation of the 8th section of the act of July 4, 1864, charging a neglect to post up in conspicuous places in a steamer, synopses of the laws relating to the carriage of passengers, as required by that section. *The Lewellen*, 156.
47. PRACTICE—SEIZURE.—In proceedings *in rem* against vessels for penalties and forfeitures under acts of Congress, it is a general rule that a seizure of the vessels must precede the filing of the libel, in order to give jurisdiction to the court; and that consequently such precedent seizure must be averred in the libel. But, if under the act of

PLEADING—Continued.

Congress, the owners execute delivery bonds, they thereby waive the objection of the want of a prior seizure. *Id.*

48. **OPPOSITION TO DISCHARGE** of a bankrupt must be in writing, and must disclose the name of the opposing creditor or creditors. *In re Shoemaker*, 245.

PLEDGE.—*See* BAILMENT.

POLICY.—*See* INSURANCE.

PRACTICE.—*See* BANKRUPTCY, 21, 27, 35, 37.

1. **MISUNDERSTANDING BETWEEN COUNSEL.**—This court will not allow parties to be injured or prejudiced by any misunderstanding between their counsel. *Campbell vs. Barclay*, 517.
2. **PARTIES.**—In a proceeding to foreclose a mortgage, all persons holding the equity of redemption of the lands or any part thereof must be made parties. *Wyman vs. Russell*, 307.
3. **PRACTICE—DELIVERY BOND.**—The execution of a delivery bond under the act of March 3, 1847, is a waiver of the objection that a seizure of the vessel should precede the filing of the libel, and that no seizure had been made. *The Lovellen*, 187.
4. **JUSTIFICATION BY SURETY.**—The affidavit of the surety on an appeal bond, as to his responsibility, where he does not personally appear is not sufficient; there must be independent evidence of his responsibility. *Hodson vs. Johnson*, 505.
5. **INDIANA CODE** authorizes a plaintiff, in a proceeding to foreclose a mortgage, to take a personal judgment for the debt secured by it, if such debt be evidenced by a note or other writing than the mortgage. *Putnam vs. New Albany*, 335.
6. **VOLUNTEER.**—An answer and cross-bill filed by a person not named in the bill, nor admitted as a defendant, will be stricken from the files. *Id.*
7. **TEMPORARY INJUNCTION—NOTICE.**—The national courts can not order temporary injunctions, except on reasonable notice to the adverse party or his attorney. *Mowry vs. Ind. & Cin. R. R. Co.*, 78.
8. **DISSOLUTION OF INJUNCTION.**—An injunction issued by a state court is dissolved by the removal of the cause into the Federal Court *Northwestern Distilling Co. vs. Corae*, 514.
9. **PRESERVING RIGHTS PENDING MOTION FOR INJUNCTION.**—On the filing of a bill praying an injunction, it is proper practice for the court to make an order that the defendants do nothing prejudicial to the rights or interests of the complainants, pending the hearing of the motion for the injunction. *Fanshawe vs. Tracy*, 490.
10. **PRACTICE IN ALLEGED CONTEMPT.**—The established practice in this court, when affidavits are filed charging any person with disobedience of the orders or process of the court, is to enter a rule on him to show cause why an attachment should not issue. *Id.*

PRACTICE—Continued.

11. **90TH RULE OF SUPREME COURT.**—Such a practice is not in conflict with the Ninetieth Rule of the Supreme court, but comes within the exception in that rule. *Id.*
12. **ATTACHMENT IN FIRST INSTANCE.**—It is, however, competent for the court, in its discretion to issue an attachment in the first instance, and without any rule to show cause. *Id.*
13. **EFFECT OF SUPPLEMENTAL BILL.**—The filing of a supplemental bill, for the purpose of bringing some of the defendants into contempt, is not a waiver of the rule *nisi* previously entered. *Id.*
14. **CONTEMPT IS AN OFFENSE AGAINST THE UNITED STATES.**—A proceeding for contempt, though growing out of a civil action, is distinct in its character, and is really a proceeding on behalf of the United States, against whose authority the offense was committed. *Id.*
15. *It seems*, that if a man imprisoned for contempt of a federal court, breaks jail and escapes to another state, he can be arrested and returned. *Id.*
16. **OFFICERS OF CORPORATION—WHEN IN CONTEMPT.**—Officers representing a corporation defendant are not in court for the punishment for contempt unless they personally knew of the order, the disobedience of which is alleged. *Id.*
17. **SUBSEQUENT ARREST.**—Persons guilty of contempt can be arrested at any time thereafter, when they come within the jurisdiction of the court. *Id.*
18. **PURGING CONTEMPT.**—The court will, at any time, give the party alleged to be in contempt full opportunities to be heard. *Id.*
19. **PROCESS STAYED.**—If a pardon is issued after judgment for a penalty, the court may order a stay of proceedings and process. *United States vs. Thomasson*, 836.
20. **SERVICE OF MANDAMUS.**—A writ of mandamus against a Board of Supervisors, whether alternative or peremptory, should be served upon the individual members. An acceptance by the clerk, although "by order of the Board," is not sufficient. *Downs vs. Board of Supervisors of Rock Island Co.*, 508.
21. **EXEMPTION.**—If the bankrupt is dissatisfied with the exemption of property allowed him by the assignee, his only mode of redress is to except to the ruling of the assignee, and have him certify the question to the district court. *In re Pryor*, 262.
22. **SUPPRESSING DEPOSITIONS.**—A motion to suppress depositions for irregularity comes too late when they have been on file for three years. *Bank of Danville vs. Travers*, 507.
23. **PETITION FOR REVIEW—WHEN MAY BE FILED.**—A petition for review, filed after the term at which the decree was rendered, and after it had been executed, will be entertained by a court of admiralty, when actual fraud is charged, and the libellant is without

PRACTICE—Continued.

fault, and would otherwise be without remedy. *Northwestern Oak Co. vs. Hopkins*, 51.

PREFERENCE.—See **BANKRUPTCY**, 22-25.

PRINCIPAL AND AGENT.—See **REAL ESTATE**, 4-11.

1. **FACTOR AND PRINCIPAL.**—Where a factor agreed with his principal to purchase for him fifty thousand bushels of wheat, in consideration that the latter would immediately forward to him by express ten thousand dollars, and the residue to pay for such purchase in four or five days, and where the principal wholly failed to forward the money, though the factor had immediately purchased twenty thousand bushels of the wheat: *Held*, that the factor was under no obligation to purchase the residue of the fifty thousand bushels. *Rice vs. Montgomery*, 75.
2. **PLACE OF DELIVERY BY FACTOR.**—In the absence of any special agreement touching the place of delivery of wheat to be purchased by a commission merchant for his principal, the law will presume the place where the commission merchant does business to be the proper place of delivery. *Id.*
3. **REASONABLE TIME.**—What is a reasonable time to send money by express from Muncie, Indiana, to Chicago, Illinois, is a question of fact for a jury. And if a declaration avers that three days are reasonable time, it is not subject to demurrer on that account. *Id.*
4. **PLEADING QUANTUM MERUIT.**—An averment that the defendant promised to pay the plaintiff reasonable commission as a factor, ought to be followed by an allegation of the reasonable value of such commission. *Id.*

PROMISSORY NOTES.—See **BILLS, NOTES AND CHECKS**.

PROOF OF CLAIM.—See **BANKRUPTCY**, 20.

QUANTUM MERUIT.—See **PLEADING**, 32.

RAILROADS.—See **CORPORATION**, 16—**COMMON CARRIER**, 4, 6.

1. **TRACKS ON PUBLIC STREETS.**—Where a railroad company is rightfully running its trains on a public street, it must do so in such a way as to be consistent with the safety of persons and property on the street. *Barley vs. Chicago & Alton R. R. Co.*, 430.
2. **RATE OF SPEED.**—Irrespective of any city ordinance, the speed must be such as to permit the stoppage of the train within a reasonable time, and the train must be provided with all usual means and appliances for stopping. *Id.*
3. **BACKING TRAINS—LOOK-OUT.**—When the engine is backing a train, there should be a look-out to give notice of any persons or obstructions. *Id.*
4. If there is steam or smoke upon the track great care and vigilance is required. *Id.*
5. **MEASURE OF DAMAGES.**—In allowing damages for the killing of a

RAILROADS—*Continued.*

- child, the jury cannot allow anything for the suffering or wounded feelings of the parents; they can only allow for actual pecuniary loss. If the family is poor, the fact that the boy would probably have early commenced to assist in supporting the family may be taken in consideration. *Id.*
6. A recovery in a former action for medical attendance, expenses, loss of service and time before his death, does not affect the damages recoverable under the statute for death. *Id.*
7. CLAIMANTS AGAINST INSOLVENT RAILROAD Co.—Claimants for materials furnished an insolvent railroad company are not entitled to payment out of a fund in court arising from a sale of the corporate property at the instance of mortgage bond-holders, until the bonds are paid. Such claimants have no specific lien upon the property. *Denniston vs. Chicago Alton & St. L. R. R.*, 414.
8. PROMISES BY RECEIVER.—Promise of payment by the receiver does not change their case; they can only take the surplus after specific liens have been discharged. *Id.*
9. EJECTION FROM RAILROAD TRAIN.—When a railroad company engages to carry a passenger, and, after taking him on the train, wrongfully puts him off, the action of trespass on the case will lie. *Emigh vs. Pittsburg Ft. Wayne & Chicago R. R. Co.*, 114.

RATIFICATION.

1. RATIFICATION—to be effectual must be unequivocal, and with full knowledge of all the facts. *Bosseau vs. O'Brien*, 395.
2. Failure to answer letters or inquiries from the agent as to the consummation of the sale do not constitute a ratification. *Id.*
3. RATIFICATION OF SUBSCRIPTION BY CITY.—An illegal subscription of railroad stock by a city may be ratified under a subsequent act of the legislature authorizing its ratification. A bill alleging such subscription ought to aver the ratification. But the answer, by putting in issue the question of such ratification, may supply the want of such averment in the bill. *Putnam vs. New Albany*, 365.

REAL ESTATE.—*See* JUDGMENT, 7—RECORDING.

1. CONDITIONAL DELIVERY OF DEEDS.—If a conveyance is delivered on condition that a life lease of the same estate be executed and delivered to the grantor, the grantee cannot recover in ejectment against the grantor, when the condition has not been fulfilled. *Henry vs. Henry*, 354.
2. Subsequent negotiations, not consummated, do not affect the rights of the parties, and one party in accepting a proposition, which the other afterwards refused to carry out, does not waive his rights. *Id.*
3. SUBSTITUTED GRANTEE.—A person substituted for the originally intended grantee, but having knowledge of the condition, does not stand in any stronger or better position. *Id.*

REAL ESTATE.—*Continued.*

4. **STATUTE OF FRAUDS—AUTHORITY TO SELL REAL ESTATE.**—Authority to an agent to sell real estate must be clear and distinct; of such a character that a fair and candid person must see without hesitation that the authority was given. *Bosseau vs. O'Brien*, 395.
5. An answer to a letter from a real estate agent asking for authority to sell lands, "I will sell" on terms specified, does not confer the authority on the agent to make a contract of sale. *Id.*
6. Correspondence between the real estate agent and the owner, concerning the lands and the price and the terms of sale, do not constitute authority to the agent to make a contract of sale, even on the terms specified by the owner. *Id.*
7. **EARNEST MONEY.**—The receipt of earnest money by the assumed agent does not bind the principal as a part performance.
8. **RATIFICATION**—to be effectual, must be unequivocal, and with full knowledge of all the facts. *Id.*
9. Failure to answer letters or inquiries from the agent as to the consummation of the sale do not constitute a ratification. *Id.*
10. **CONSTRUCTION OF AUTHORITY.**—An authority to sell must be strictly construed, and the purchaser must show that the contract complies fully and entirely with the authority. *Id.*
11. An agent making a contract of sale should forward a copy of the contract to the principal. *Id.*
12. **BONA FIDE PURCHASER.**—A party can protect himself as a *bona fide* purchaser, either by showing payment by himself without notice, or that he took through some *bona fide* purchaser without notice. *Mills vs. Smith*, 442.
13. **RECITAL IN RECORDED DEED—WHEN NOTICE.**—A recital in a recorded deed, the grantor in which had no record title to the property, does not operate as constructive notice; it is different where the party sees or has actual notice of such recital. *Id.*
14. **ADOPTION VALIDATES VOID DEED.**—A widow by re-acknowledging a deed executed by her while married, and therefore void, gives it full validity and force. *Riggs vs. Boylan*, 445.
15. **RE-SIGNATURE NOT ESSENTIAL.**—It is not necessary that she re-sign the deed; it is sufficient that she acknowledge it to be her deed. *Id.*
16. **FILING DEED FOR RECORD SUFFICIENT.**—When a deed is actually left with the recorder for record, the grantee has done all that the law requires, and his rights are protected, even though the recorder actually records only a portion of it. *Id.*
17. **REDEMPTION—FRAUDULENT CONFESSION OF JUDGMENT.**—Where a judgment creditor, to protect his interest, has purchased the property on foreclosure of a prior mortgage, and the debtor had fraudulently confessed a judgment to enable a third party to redeem the property for his benefit, this court has jurisdiction of a bill for relief filed by the creditor. *Currie vs. Jordan*, 518.

RECEIVER.

1. RECEIVER.—A receiver cannot be called on to account before any court but that which appointed him. *Conkling vs. Butler*, 22.
2. JURISDICTION.—Where a state court, on a petition under the Indiana statutes to dissolve a corporation, has taken jurisdiction, thereby decreed a dissolution of the corporation, appointed a receiver, and taken the custody of the assets, no national court can take jurisdiction of a bill to call on the receiver to render an account, and to collect the assets under the direction of the United States Court. *Id.*
3. APPOINTMENT OF RECEIVER—DISCRETIONARY.—The appointment of a receiver is generally within the sound discretion of the court. But it is a power only to be exercised in strong cases. In no case of a mortgage ought a receiver to be appointed if it is clear that on a foreclosure the mortgaged property will bring enough money to pay the debt, interest, and costs. *Pullan vs. Cin. & Chi. Air-Line R. R. Co.*, 35.
4. CLAIMANTS AGAINST INSOLVENT RAILROAD CO.—Claimants for materials furnished an insolvent railroad company are not entitled to payment out of a fund in court arising from a sale of the corporate property at the instance of mortgage bond-holders, until the bonds are paid. Such claimants have no specific lien upon the property. *Denniston vs. Chicago A. & St. L. R. R.*, 414.
5. PROMISES BY RECEIVER.—Promise of payment by the receiver does not change their case; they can only take the surplus after specific liens have been discharged. *Id.*

RECITALS.—*See* ESTOPPEL, 3—REAL ESTATE 13.

RECORD.—*See* EVIDENCE, 7.

RECORDING.

1. RECORD OF DEED—WHAT CONSTITUTES.—The filing a deed for record with the recorder of the proper county is, in Illinois, all that is required of the grantee, and his rights are not affected though the recorder fails to record it, or enter it in his minute book. *Polk vs. Cosgrove*, 437.
2. Notice to the plaintiff's attorney in attachment proceedings of an unrecorded deed of the land attached operates as notice to the plaintiff. *Id.*
3. NOTICE.—But a clause in a deed from a stranger to the title is not notice to purchasers. *Id.*
4. FILING DEED FOR RECORD SUFFICIENT.—When a deed is actually left with the recorder for record, the grantee has done all that the law requires, and his rights are protected, even though the recorder actually records only a portion of it. *Riggs vs. Boylan*, 445.
5. CONVEYANCE DOES NOT RELATE BACK TO CONTRACT.—A deed made in pursuance of a recorded contract does not relate back so as to cut off intervening equities, and convey the title as of date of con-

RECORDING.—*Continued.*

tract. *Snapp, et al, vs. Pierce, et al*, 38 Illinois, 156, criticised. *O'Neil vs. Wabash Ave. Baptist Church Society*, 483.

6. EFFECT OF RECORDING LAWS.—They only enable the purchaser to compel the consummation of the title under the contract; but where the contract is subject to forfeiture, and only a small part of the purchase money was paid, the conflicting interests should be adjusted by a court of equity. *Id.*
7. JUDGMENT BEFORE CONVEYANCE.—The legal title remains in the vendor until the conveyance, and a judgment against him binds his interest in the land. *Id.*
8. RECORDING MORTGAGE.—Under the Indiana Code of 1888, a neglect to record a mortgage within the prescribed time did not invalidate it, except as to a subsequent *bona fide* purchaser or mortgagee whose deed or mortgage was first recorded. *Wyman vs. Russell*, 307.

RES JUDICATA.—*See* ESTOPPEL, 4—DAMAGES, 7.

1. RES JUDICATA—CHANGE OF FORUM.—Where a suit commenced in the State Court has been carried to the Supreme Court, and a new trial ordered, the plaintiff has the right to dismiss his suit and commence in the Federal Court; the opinion of the Supreme Court does not constitute a bar unless it finally determines the suit. *Hasard vs. C. B. & Q. R. R. Co.*, 453.
2. But, on substantially the same state of facts, the plaintiff is bound by the *law* as laid down by the State Supreme Court; he cannot change the forum to obtain a different ruling. *Id.*
3. NEW EVIDENCE.—The plaintiff has the right, however, to introduce evidence showing a new or different state of facts from those shown on the former trial. *Id.*
4. ASCERTAINMENT OF LIEN.—The word in section one of the Bankrupt Act, extending jurisdiction "to the ascertainment and liquidation of the liens and other specific claims" upon the bankrupt's property, apply only to cases where these liens or claims have not been previously determined by other competent tribunals. *The Ironsides*, 518.

REVIEW.—*See* PETITION FOR REVIEW.ROLLING STOCK.—*See* CORPORATION, 5.SALE.—*See* TRADE MARK—REAL ESTATE, 4-11—INSURANCE, 5—ATTACHMENT.SATISFACTION.—*See* PAYMENT—JUDGMENT, 4, 5.SCHEDULE.—*See* BANKRUPTCY, 33, 36.SECURITY.—*See* BANKRUPTCY, 21, 25-28.SERVICE.—*See* PRACTICE, 20.SIDEWALKS.—*See* NEGLIGENCE, 4, 7, 8.SIGNATURE.—*See* REAL ESTATE, 15.STALE DEMAND.—*See* CHANCERY, 5.

STATUTE OF FRAUDS.—*See* REAL ESTATE, 4-11.

STATUTES OF THE UNITED STATES.

The following, among others, commented on and construed:

Judiciary act of 1789. *Noell vs. Mitchell*, 346.

December 31, 1792. *The Lowellen*, 167.

March 3, 1847. *The Lowellen*, 167.

March 3, 1863. *United States vs. Sonachall*, 425.

March 5, 1864. *The Lowellen*, 167.

Internal Revenue Act of June 30, 1864, §78. *United States vs. Morin*, 99.

July 4, 1864. *The Lowellen*, 156. *The Nashville*, 188.

Internal Revenue Act of March 3, 1865, §91. *United States vs. Thomason*, 99.

Bankrupt Act of March 2, 1867. *See* BANKRUPTCY.

STATUTES OF ILLINOIS.

February 12, 1867. *Bradley vs. Lill*, 473.

STEAMERS.—*See* ADMIRALTY, 8, 10, 11, 15—NEGLECT, 1—INTERNAL REVENUE, 2.

STOCKHOLDERS.—*See* TAXATION.

SURETY.—*See* PLEADINGS, 26.

SURRENDER.—*See* BANKRUPTCY, 24.

SUBSCRIPTION.

1. RATIFICATION OF SUBSCRIPTION BY CITY.—An illegal subscription of railroad stock by a city may be ratified under a subsequent act of the legislature authorizing its ratification. A bill alleging such subscription ought to aver the ratification. But the answer, by putting in issue the question of such ratification, may supply the want of such averment in the bill. *Putnam vs. New Albany*, 865.
2. SUBSCRIPTION—WHEN CANNOT BE RESCINDED.—A subscription of capital stock in a corporation cannot be rescinded so as to affect the rights of its creditors while the corporation is solvent. *Id.*
3. WHEN MAY BE MODIFIED.—But when the subscription is conditional, and while the corporation is solvent, it may be reduced and modified according to the terms of the condition; and such modification, acquiesced in at the time by all parties, will not, after the lapse of fifteen years, be set aside. *Id.*

TAX DEED.

TAX DEED.—A judgment for taxes, sale, and tax deed, constitute a breach of the covenant of warranty of seizin, and it is not a good plea that the sale was not valid. *Farriss vs. Farris*, 409.

TAXATION.

1. STATE TAXATION OF NATIONAL BANKS.—The capital stock of a na-

TAXATION.—Continued.

tional bank cannot be assessed, as such, by state authority.—*Colins vs. City of Chicago*, 472.

2. The only way such stock can be reached is by assessment of the shares of the different stockholders. *Id.*

TAXES.—See INTERNAL REVENUE, 1.

TIME.

REASONABLE TIME.—What is a reasonable time to send money by express from Muncie, Indiana, to Chicago, Illinois, is a question of fact for a jury. And if a declaration avers that three days are reasonable time, it is not subject to demurrer on that account. *Rice vs. Montgomery*, 75.

TRADE MARK.

1. **SALE OF INTEREST IN TRADE MARK.**—A court of equity has no power to decree the sale of a partner's interest in a firm brand or trademark. Such an interest is too intangible. *Taylor vs. Bemis*, 406.
2. **COURT WILL NOT SELL AN INTANGIBLE INTEREST.**—Before decreeing a sale of an alleged interest of a partner, the court must be satisfied that the object or interest sought to be sold has some substantial, tangible value. *Id.*

TRAVELING EXPENSES OF WITNESSES.—See WITNESSES, 2, 3.

TRUSTS AND TRUSTEES.

1. **CONSTRUCTION.**—A naked power or trust must be strictly construed. *Speigle vs. Meredith*, 120.
2. A conveyance of land in consideration of coupon bonds is a sale of the land. Such a sale by a trustee empowered to sell the land may be valid, though it is not a sale for money. *Id.*

TUGS.—See ADMIRALTY, 19, 21, 22, 30-33.

VENDITIONI EXPONAS.—See ATTACHMENT.

VOLUNTEER.

An answer and cross-bill filed by a person not named in the bill, nor admitted as a defendant, will be stricken from the files. *Putnam vs. New Albany*, 365.

WAIVER.—See ADMIRALTY, 17—EVIDENCE, 9—ESTOPPEL, 8.

Subsequent negotiations, not consummated, do not affect the rights of the parties; and one party in accepting a proposition, which the other afterwards refused to carry out, does not waive his rights. *Henry vs. Henry*, 354.

WITNESSES.

1. **RECOGNIZING WITNESSES—DUTY OF DISTRICT ATTORNEY.**—It is the duty of the district attorney, in criminal prosecutions by the Government, where he has any doubt whether the witnesses will attend, to have them properly recognized. *United States vs. Durling*, 509.

WITNESSES.—Continued.

2. **TRAVELING EXPENSES—TENDER.**—If a witness subpoenaed by the Government has means to travel, it is not necessary for the officer to tender his traveling expenses; and the court will attach a witness who, on that ground, neglects to attend. *Id.*
3. The officer summoning witnesses should see that those who have no means to travel are provided with necessary funds. *Id.*





